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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GILBERT A. HARING, LIEUTENANT, ARLINGTON COUNTY POLICE DEPARTMENT; HENRY W. ALLEN, DETECTIVE; J. R. BADEY, DETECTIVE; ALVIN BEUCHERT, OFFICER; AND STANLEY GARBER, OFFICER,

Petitioners,

vs.

JOHN FRANKLIN PROSISE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can a person who has pleaded guilty in a state criminal court to manufacturing illegal drugs, and who did not raise the validity of search that produced the essential evidence of the crime, subsequently bring an action in a federal court under 42 U.S.C. § 1983 claiming that the search was unconstitutional?

a. By pleading guilty in a state criminal court, does a person waive any right to litigate in a § 1983 action the constitutionality of the search which produced the essential evidence of the crime?

b. Does a conviction based upon a plea of guilty collaterally estop the later litigation in a federal court § 1983 action of the search and seizure claim, where the state court expressly found a sufficient factual basis for the plea and that basis was the evidence produced by the search?

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OPINIONS BELOW

The opinion of the United States Court of Appeals For the Fourth Circuit is now reported at 667 F.2d 1133 (4th Cir. 1981) and it is found in the appendix to this petition at pp. 7a through 34a. The opinion of the Albert V. Bryan, Jr. in the

United States District Court is unpublished but is also found in the appendix to this petition at pp. 35a through 45a.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A panel of the Fourth Circuit Court of Appeals entered its judgment on December 30, 1981. App. at p. 6a. A timely Petition for Rehearing En Banc was filed on January 13, 1981, by the petitioners ("police officers"). On March 19, 1982, the petition for rehearing was denied by the panel and the suggestion of a rehearing en banc was denied by an evenly divided court; a poll was taken and Judges Russell, Widener, Hall, Murnaghan and Chapman voted in favor of a rehearing en banc. App. at p. 5a. 28 U.S.C. § 1254 (1) is believed to confer jurisdiction on this Court to review the judgment of the Fourth Circuit by a writ of certiorari. The circuit court has stayed its mandate pending this application for a writ of certiorari. App. at pp. 1a and 3a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution Amendment IV, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution Amendment XIV, Section 1, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, which provides:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1738 which provides in part:

> "Such Acts, records and judicial proceeding, [of a state] or copies thereof, so authenticated shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

The respondent (Prosise) filed a pro se action in the United States District Court For the Eastern District of Virginia claiming that the police officers violated his fourth and fourteenth Amendment rights while acting under color of law. Prosise alleged that, pursuant to a warrant, the officers illegally searched and seized certain items in his apartment. The action was based upon 42 U.S.C. § 1983, and the district court took jurisdiction of the case apparently pursuant to 28 U.S.C. § 1343.

On the day of the search,[1] the officers had earlier responded to a radio call about a domestic disturbance in an apartment occupied by Prosise and his fiancee, Katherine Denny. The officers arrived just after guns were fired in the apartment. As a result of their investigation, Prosise was arrested at the scene for attempting to kill Denny.

Denny stated to the arresting officers that Prosise was "making PCP" (or "angel dust") and she showed them a baggie she said contained PCP and a closet where there were various chemicals and devices. Detective Allen of the "vice-squad" arrived, examined the closet, noticed a smell of ether, performed a field test, and concluded that these were chemicals and apparatus used to make PCP. He then went to a magistrate and obtained a warrant which authorized a search of the entire apartment to find PCP. The apartment was searched and the chemicals, apparatus, and receipts showing the purchase of certain chemicals used in the manufacturing of PCP were seized. The chemicals were submitted for expert analysis.

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[1]These facts are found in the affidavits of the officers which were submitted in support of their motion for summary judgment. They are also recited in the opinion of the Fourth Circuit. *Prosise v. Haring*, 667 F.2d 1133, 1134-35 (4th Cir. 1981).

Prosise was then charged with possession of PCP and manufacturing PCP. Prosise entered into a plea agreement whereby the charge of possession was nol-prossed in return for a guilty plea to manufacturing PCP.

A hearing was held by the Arlington County Circuit Court by Charles S. Russell where Detective Allen took the stand and testified at length about why the search mentioned above was made, what was seized, and the results of the experts' chemical analysis. These pages from the state court transcript are found in the Appendix at pp. 46a-59a. After hearing the details of the search and seizure, the state trial court said:

> "The court finds the plea of guilty to be voluntarily and intelligently tendered *and finds there is sufficient factual basis; and upon the evidence heard this morning, the Court finds the defendant quilty of the manufacture of phencyclidine as charged in the indictment C-12689."* Emphasis added. App. 58a.

Prosise was sentenced to twenty-five years imprisonment and this conviction is final. (This was later reduced to twelve years.) Prosise then filed this action for damages in the district court under 42 U.S.C. § 1983.

In support of their motion for summary judgment, the officers provided among other things the plea agreement and the transcript of the hearing where Prosise pleaded guilty. The district court granted the officers summary judgment.

The district court chose to base its grant of summary judgment on the search and seizure issue upon collateral estoppel and waiver principles.[2] It reasoned that "The plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful." App. 41a. Further, the court concluded that the "reasoning undergirding this Court's decision in *Tollett v. Henderson,* 411 U.S. 258 (1973), precluded Prosise's assertion of the fourth amendment claim in this § 1983 action.[3] App. at 44a. Judge Bryan stated:

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[2]The district court also concluded that it was convinced on the merits that the search and seizure was lawful. App. at p. 38a. However, it further reasoned that the basis for the grant of summary judgment should be on estoppel grounds rather than on the merits. App. at p. 39a.

[3]The district court reached its decision before this Court decided *Allen v. McCurry,* 449 U.S. 90 (1980) (collateral estoppel applicable in a subsequent § 1983 action involving a search and seizure). Thus at the time of Judge Bryan's decision, the Fourth Circuit's position on the general issue of estoppel in § 1983 actions involving prior state court criminal convictions was *Rimmer v. Fayetteville Police Department,* 567 F.2d 273 (4th Cir. 1977). *Rimmer* concerned the "actual litigation" of the issue in the prior state proceeding and generally embraced the

(footnote continued)

> "If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*." App. at p. 44a.

Prosise appealed to the Fourth Circuit the grant of summary judgment, and that court's decision was rendered on December 30, 1981. The panel reversed the district court and held that Prosise was not barred by his guilty plea from litigating the validity of the search even though it produced the evidence essential to his conviction. The Fourth Circuit in *Prosise* adopted a "flat-rule of nonpreclusion" in § 1983 cases involving guilty pleas for essentially two reasons: first, it concluded that the court in the collateral proceeding would frequently find it impossible to tell if the criminal defendant had adequate "incentive" to litigate the constitutional issue in the state court, and secondly, and more importantly, the federal

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(footnote continues)

position that collateral estoppel only applies to issues which can be presented in a federal habeas corpus proceeding; this assured a person at least one opportunity to have a federal court review the constitutional issue. This Court in *Allen v. McCurry*, rejected this aspect of the *Rimmer* decision.

1983 forum is now the only one available for the assertion of the particular constitution claim. *Prosise, supra* at 1142.

A petition for rehearing en banc was made which argued that the panel's decision overlooked material facts and law, and that a conflict had been created possibly within the Fourth Circuit and definitely between the Tenth and Fourth Circuits.

On March 19th, the panel denied the petition, and by an evenly divided court the petition for rehearing en banc was also denied. A poll was taken and Judges Russell, Widener, Hall, Murnaghan and Chapman would have granted the rehearing. On March 29, 1982 and again on April 28, 1982, the Fourth Circuit entered an order which stayed the mandate of the circuit court for thirty days, pending application of the officers in the Supreme Court of the United States for a writ of certiorari to the circuit court.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. SUMMARY

Even though this Court and the Virginia Supreme Court have established the principle that a guilty plea essentially waives the right to later seek one's freedom based on an alleged fourth

amendment violation, the result of the circuit court's *Prosise* decision is that the same person can nonetheless seek money damages under § 1983. Although *Prosise* had a "full and fair opportunity" to litigate the search and seizure in state court, he voluntarily chose to forego it when he entered into a plea agreement. This waiver must be judicially enforced to avoid attacks on otherwise final state criminal convictions. To hold otherwise, as the circuit court did, will allow a state criminal defendant to plead guilty under favorable terms and conditions and to forum shop by then adjourning to a federal court to raise constitutional claims.

Although the Fourth Circuit established in another recent decision that it will apply waiver or preclusion to unlitigated fourth amendment claims where a state criminal trial took place, it has arbitrarily denied similar effect when a guilty plea is present. *Cramer v. Crutchfield*, 648 F.2d 943 (1981) (per curiam). The Fourth Circuit decision in *Prosise* is also in direct conflict with that of the Tenth Circuit in the same matter. *Metros v. United States District Court*, 441 F.2d 313 (1971). The reasoning of *Prosise* decision also conflicts with the principles underlying decisions by the First and Ninth Circuit, for example, in related cases involving unlitigated legal claims and guilty pleas.

The *Prosise* decision is directly at odds with the principles established by this Court in *Tollett v. Henderson*, 441 U.S. 258 (1973) (plea of guilty waives all antecedent constitutional objections), and *Stone v. Powell*, 428 U.S. 465 (1976) (no right to litigate fourth amendment issue in federal court).

The 1983 action should be precluded by principles of collateral estoppel and waiver. For all of these reasons, the petition for writ of certiorari should be granted and the decision reversed.

II. THE DECISION OF THE FOURTH CIRCUIT WILL ENCOURAGE COUNTLESS STATE PRISONERS TO LITIGATE CLAIMS OF UNLAWFUL SEARCH AND SEIZURE AND TO CHALLENGE THEIR STATE COURT CONVICTIONS THROUGH § 1983 ACTIONS EVEN THOUGH THE SEARCH WHICH PRODUCED THE EVIDENCE WAS THE VERY BASIS FOR THEIR CONVICTION.

The Fourth Circuit's primary reason for its "flat-rule of non-preclusion" in § 1983 actions of issues which were not actually litigated during guilty plea hearings in state court, was that after *Stone v. Powell, supra*, the "§ 1983 federal forum is the only one available for assertion of this particular constitutional claim." *Prosise, supra* at 1142. Although the circuit court recognized that the decision of *Allen v. McCurry*, 449 U.S. 90, 105 (1980), rejected this reason as a sufficient basis

for a "blanket rejection of collateral estoppel in § 1983 actions involving fourth amendment claims," the circuit court found it nonetheless a legitimate reason "well within conventional doctrine." *Prosise, supra* at 1142. As discussed further below, there is no basis for saying that there is a greater need to have federal review of fourth amendment claims arising in state courts in guilty plea cases than when such claims arise during a state court trial.

This Court is fully aware of the rising amount of § 1983 litigation in the federal courts, and the officers will not dwell on this point. The officers respectfully suggest that this litigation will unnecessarily increase if prisoners and other convicted persons are able to seek damages for fourth amendment claims even when they have pleaded guilty, and in particular even when the evidence produced by the search in issue in the later 1983 action was essential to the conviction.

There are strong public policy interests which require that Prosise's § 1983 action be precluded. First, by holding that waiver or estoppel precludes Prosise's 1983 action, this Court would prevent the creation of a new method by which defendants can indirectly attack the

validity of guilty pleas in state courts.[4] There should be finality of judgment, cessation of litigation and a respect for the state court's ability to resolve constitutional issues. To accomplish this, the guilty plea should be given full force and effect. To hold otherwise will disrupt the comity between state and federal governments.[5]

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[4]Although a person who has pleaded guilty cannot obtain his freedom in a habeas corpus proceeding by raising a search and seizure that resulted in his conviction, he will be able to seek money damages from the officers involved. The quantum of damage should not include compensation for time spent in jail since the incarceration was caused by the commission of the crime. However, it will no doubt be argued that people like Mr. Prosise should be able to seek compensation for time spent in jail since the fruits of the search in question in effect put them there. This Court should not permit convicted persons to recover damages for their incarceration under these circumstances.

[5]It is important to note that the *Prosise* court did consider the impact of 28 U.S.C. § 1738. However, the circuit court concluded that Virginia's law on the question was uncertain and not authoritatively addressed by the Virginia courts. *Prosise, supra* at 1138-39. Although the *Prosise* court also concluded that "waiver" was not applicable to the issue, Virginia law is clear that a guilty plea in a criminal case waives the right to contest all but jurisdictional issues. See *Kilbert v. Commonwealth*, 216 Va. 660, 664, 222 S.E.2d 790, 793 (1976). Moreover, in *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (discussed further in the text below), the Fourth Circuit held that under waiver principles the failure to raise a fourth amendment issue in a state court trial

(footnote continued)

An equally important consideration is that a defendant who pleads guilty should not be entitled to greater federal protection than the criminal defendant who fully and fairly litigates constitutional issues in the state court system. As this Court said in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975):

> "A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. *McMann v. Richardson, supra*, at 768, 25 L.Ed.2d 763. Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby

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(footnote continues)

waived the right to litigate the issue in a § 1983 action in federal court. Presumably the same considerations of § 1738 were at work in *Crammer* as are present in *Prosise*.

Even if Virginia did refuse preclusion or waiver, the officers submit that the principles embodied in § 1738 are not offended if the federal courts chose to give greater effect in a 1983 action to a guilty plea upon an unlitigated fourth amendment issue than Virginia would. But see *Prosise, supra* at 1138, fn. 4.

obtained." *Lefkowitz v. Newsome, supra,* 420 U.S. at 289.

The criminal defendant who deliberately refuses to follow the orderly procedure for litigating constitutional claims in order to accept the benefits of a guilty plea should not be entitled to the added benefit of unencumbered access to a federal forum.[6] To reward those defendants who plead guilty would create at least a marginal disincentive to the assertion, and full and fair litigation, of all constitutional claims in the state system.

III. THE PANEL FAILED TO CONSIDER THE EXPRESS FINDING BY THE STATE COURT THAT THE SEARCH AND SEIZURE WAS THE BASIS OF THE CONVICTION AND IT GAVE PRIMARY IMPORTANCE TO THE LACK OF A FEDERAL FORUM FOR THE 1983 CLAIM.

The lengthy testimony about the search and seizure and the express finding by the state trial court that the facts revealed by the search and seizure formed the basis of the finding of guilt are the single most important facts in the case at bar.

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[6]Petitioners are aware of the case of *Jordan v. United States* (and certain state defendants), Civil No. 8-750 PNX WPC now pending the United States District Court for Arizona where the 1983 plaintiffs are attempting to pursue fourth amendment claims after pleading guilty in state court.

These facts are not mentioned in the Fourth Circuit's opinion. Rather than restrict its decision to cases such as the instant one, where the state court record makes it abundantly clear which issues were and were not necessarily decided by the guilty plea, the panel lumps all guilty pleas together.

It is difficult to understand how the Fourth Circuit reached its conclusion that in guilty plea cases it is likely that one could not determine fairly and expeditiously whether a criminal defendant had adequate "incentive" to make a suppression motion. For example, the Fourth Circuit admits in the preceding sentence that "the question could always be resolved in the usual processes, many times fairly and occasionally even rather easily...." *Prosise, supra* at 1141-42.

Prosise had every reason to contest the search, and he chose not to do so; at stake was up to forty years imprisonment. See Va. Code Ann. § 18.2-268. There is no doubt but that Prosise's conviction for manufacturing PCP could not have been obtained without the chemicals, devices, receipts of purchases of chemicals, and experts' analyses of this seized evidence in this case.

The Fourth Circuit assumes, without any basis, that in most all guilty plea situations there

is likely to be some incentive *not* to make a supression motion or that some injustice occurred in the state court. Underlying the Fourth Circuit's decision in *Prosise* is an implicit distrust of the state court system. This distrust is evident at page 1142 of its opinion where the court states that the "more important" reason for adopting a general rule of non-preclusion is that the "§ 1983 federal forum is the only one available for assertion of this particular claim." *Prosise, supra* at 1142. In essence, the circuit court has ignored *Stone v. Powell, supra,* and *Allen v. McCurry, supra.*

In *Stone v. Powell,* the Court held that fourth amendment claims which were capable of being fully and fairly litigated in state court could not be reasserted in federal *habeas corpus* proceedings. Some courts construed *Stone v. Powell* to make collateral estoppel inapplicable to § 1983 actions involving fourth amendment claims on a general belief that there must be at least one unencumbered right to litigate such an issue in a federal court. See *McCurry v. Allen,* 606 F.2d 795 (8th Cir. 1979).

But this reasoning was flatly rejected by the Court in *Allen v. McCurry, supra.* The Court in *McCurry* said that preclusion cannot be denied a state court judgment out of a distrust of the ability of state courts to correctly decide consti-

tutional issues. Section 1983 is now the only hope of pursuing this particular claim because Prosise voluntarily chose not to assert the claim in the state court. As the *McCurry* Court said, there is no principle whereby a person has a universal right to litigate a constitutional claim in federal court, and the error of the panel's opinion is that it seeks to create such a right. *McCurry* at 105. Moreover, there is nothing in the legislative history of § 1983 which indicates that Congress intended to deny binding effect to a state court judgment when the parties had a full and fair opportunity to be heard. *McMurry* at 104.

A. PROSISE'S GUILTY PLEA IN STATE COURT WAS A WAIVER OF THE RIGHT TO ASSERT A CONSTITUTIONAL VIOLATION IN A SUBSEQUENT 1983 ACTION.

It is a well settled principle of federal law that a criminal defendant who pleads guilty waives the right to raise antecedent constitutional objections in subsequent proceedings. *Tollett v. Henderson,* 411 U.S. 258 (1973). This is also the rule in Virginia. *Kilbert v. Commonwealth,* 216 Va. 660, 664, 222 S.E.2d 943 (1976). As this Court stated in *Tollett:*

> "We thus reaffirm the principle recognized in the *Bradey* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the

> criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea...." 411 U.S. at 267.

The issue in *Prosise* is whether this principle of waiver should apply to a fourth amendment claim which could not be brought in a habeas petition is brought in a § 1983 action.

The district court approached the *Prosise* case in this manner. It noted that under *Menna v. New York,* 423 U.S. 61 (1975) (per curiam), a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." App. at p. 43a. The district court reasoned that great significance must attach to a criminal defendant's decision to plead guilty, and stated:

> "If a defendant who pleads guilty is foreclosed from obtaining his freedom

> because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate th[illegible] antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*. The Court thus concludes that plaintiff's fourth amendment claim cannot be maintained in this § 1983 action under the reasoning undergirding the *Tollett* decision." App. at p. 44a.

The Fourth Circuit in *Prosise* rejected the application of this waiver principle, and said that it applies "only to subsequent habeas corpus proceedings challenging the criminal conviction."

The rejection of a waiver principle by the Fourth Circuit in *Prosise* cannot be reconciled with that same court's analysis and holding in *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (per curiam). Cramer filed a Section 1983 action for damages and claimed that a police officer that arrested him for illegally having a radar device had violated Cramer's constitutional rights when the officer searched the cab of Cramer's truck and seized the radar device. Cramer was tried and convicted in state general district court of equipping his vehicle with a radar device in vio-

lation of Va. Code § 46.1-198.1. Cramer did not assert in his trial that his fourth amendment rights had been violated. The federal district court in *Cramer* dismissed Cramer's 1983 claim of an unconstitutional search and seizure.

The Fourth Circuit affirmed the dismissal and said:

> "But Cramer did not object to the evidence derived from the search or move to suppress it at his trial in the Prince George County District Court. *He therefore waived any challenge to the constitutionality of the search.*" *Cramer, supra,* at 945. Emphasis added.

This same reasoning applies to *Prosise* like the seizure of the radar device in *Cramer,* the state court record in *Prosise* also showed that the search and seizure of the chemicals, devices, and receipts of drug purchases were essential to Prosise's conviction. Despite this similarity of facts in *Cramer* and *Prosise,* the *Prosise* panel inexplicably states:

> "In *Cramer* it was manifest from the record that the evidence used to convict in the state criminal prosecution was that obtained by the search and seizure which formed the basis for the

> Section 1983 action. This made equally manifest the Section 1983 plaintiff's 'adequate incentive' to seek its suppression in the state action. *It is precisely because the guilty plea obscures what was manifest in Cramer that we hold here against preclusion.*" Fn. 15 at 1142. Emphasis added.

But even a casual examination of the record in *Prosise* shows that the search was essential to Prosise's plea and that he had "adequate incentive." This ability of a court to determine the impact of a particular constitutional issue on a conviction and hence the adequacy of the incentive to litigate, is not substantially different in trials than it would be in guilty pleas. The point of distinction advanced by the Fourth Circuit is without any basis.

B. PROSISE'S § 1983 ACTION IS ALSO PRECLUDED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

The *Prosise* court begins with the observation that *McCurry* forbids the application of any collateral estoppel doctrine except a "conventional one," and assumes that the application of preclusion in a guilty plea case is not conventional. *Prosise, supra* at 1137. But the Court in *McCurry* said only that the issue before them concerned an example of the "conventional doctrine." Rather

than describing what was or was not "conventional" doctrine or what might obtain in other cases, the Court expressed no opinion and certainly does not forbid the application of collateral estoppel to issues involved in guilty plea cases.

Moreover, the use of issue preclusion in guilty plea cases where the search and seizure issue was essential to the state conviction is not "new" nor is it harsher (or more "stringent") than the preclusion that obtains when a trial took place but the issue was not raised. For example, it was used in 1969 in *Palma v. Powell,* 295 F. Supp. 924 (N.D. Ill.) (because evidence essential to conviction, the plaintiff in a Section 1983 action held precluded from relitigating a search and seizure); it was used in 1971 by the Tenth Circuit in *Metros v. United States District Court,* 441 F.2d 313; in 1972, the Seventh Circuit in *Williams v. Liberty* 461 F.2d 325, expressed its approval of *Palma v. Powers;* and this precise rule of preclusion was applied in *Hooper v. Guthrie,* 390 F. Supp. 1327 (W.D. Pa. 1975). In *Ford v. Manion,* 30 Cr.L. Rptr. 2309 (N.D. N.Y. January 6, 1982), the court reached the exact opposite conclusion than did the *Prosise* court after extensive review of *Allen v. McCurry.*

Some courts have applied preclusion to civil actions based on a prior guilty plea where the

issue was an element of the offense. See *Fontneau v. United States,* 654 F.2d 8 (1st Cir. 1981) (taxpayer's plea of guilty to tax evasion in 1968 bars relitigation of issue of fraud in 1968 when taxpayer brought a late suit for refund); *Brazzell v. Adams,* 493 F.2d 489 (5th Cir. 1974).

Guilty pleas have provided the basis for estoppel (or waiver) in other contexts. For example, in *United States v. $31,697.59 Cash,* 665 F.2d 903 (9th Cir. 1982),[7] the court held that defendants who had pleaded guilty to a criminal charge involving filing false reports when bringing monetary instruments into the county were collaterally estopped from trying to stop the forfeiture of the instruments on the grounds their pleas were involuntary under Fed.R.Crim.P. 11(f). The court reasoned that a claimant who "by-passes opportunities to raise a claim in one forum should not be able to raise it in a collateral forum without a showing of any special circumstances." *Id.* at 906.

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[7]See also, *Larios-Mendez v. Immigration and Naturalization Service,* 597 F.2d 144 (9th Cir. 1979) (person's plea of guilty to a charge of aiding and abetting the illegal entry of aliens would stop the assertion of a Fourth Amendment claim of illegal stop in a subsequent civil deportation proceeding against that same person); and *United States v. One 1973 Dodge Van,* 416 F.Supp. 43, 46 at n. 1 (E.D. Mich. 1976) (car owner's plea of guilty to carrying illegal drugs in his car was a waiver of his right to later contest the constitutionality of his arrest and search of his car in a subsequent forfeiture proceeding).

IV. THERE IS NOW A CONFLICT IN THE CIRCUIT COURTS.

The Fourth Circuit's general rule of non-preclusion in guilty plea cases directly conflicts with the position of the Tenth Circuit. In *Metros v. United States District Court*, 441 F.2d 313 (10th Cir. 1971), the court held that a plaintiff in 1983 action against police officers who has searched his apartment pursuant to a warrant was precluded from alleging that there was no probable cause to support the warrant. The plaintiff had pleaded guilty in state court, and it was held that the subsequent 1983 action on the fourth amendment claims were barred under the doctrine of issue preclusion as the court noted that a "guilty plea is conclusive as to all but jurisdictional issues." *Id.* at 317.

The Fifth Circuit has reached the issue insofar as the essential facts of the crime are concerned. *Brazzell v. Adams, supra.* In *Brazzell v. Adams, supra,* a § 1983 action claiming illegal entrapment in an earlier state criminal case was held to be barred. *Brazzell,* at 490.

Similarly, as the district court said in its opinion in the instant case, "[t]he plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful." App. at 41a. The reason for the circuit court's flat-rule

of non-preclusion in guilty plea cases involving potential but unlitigated claims and its recognition of preclusion where essential elements of the crime are admitted, is that there is evidence of "incentive" to litigate only in the latter situation. *Prosise, supra* at 1140-41. But as appears in the state court record, there is ample evidence of Prosise's incentive to litigate "to the hilt." See *Prosise,* at 1141.

Thus the *Prosise* decision not only has created a direct conflict with the Tenth Circuit's decision in the *Metros, supra,* case but *Prosise* also conflicts with the approach of the Fifth Circuit in *Brazzell, supra,* and with the principles relied upon by the Ninth Circuit in *United States v. $31,697.-59 Cash, supra,* and those relied upon by the First Circuit in *Fontneau v. United States, supra.* The Fourth Circuit should have recognized that the federal court hearing the 1983 action would be able to examine the state court record and determine the adequacy of the incentive to litigate for purposes of collateral estoppel. But in any event, the Fourth Circuit should have found that the plea of guilty was a waiver of the search and seizure claim.

CONCLUSION

The *Prosise* Court has lost sight of the real situation this case presents. There is nothing

inherently unfair about attaching great significance to a guilty plea in a serious offense like Prosise's. When the record in the state court clearly shows that the search in issue in the 1983 case provided the very basis for the conviction, it is plainly wrong to allow the convicted person to litigate that search. There is no sufficient reason for permitting damage claims when those same persons are foreclosed from obtaining their freedom through habeas corpus.

The circuits are now in conflict on this very important issue, and significant judicial resources will be expended unnecessarily if the Fourth Circuit's decision is not reviewed. The effect of the *Prosise* court's opinion will be to severely undermine state court criminal convictions, and to unnecessarily increase burden of the federal courts. For these reasons, this Court should issue a writ of certiorari to the Fourth Circuit Court of Appeals.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed April 28, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer; and
GARBER, Officer,

Appellees.

O R D E R

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed for an additional 30 days to and including, May 28, 1982, pending application of the appellees in the

Supreme Court of the United States for a writ of certiorari to this court.

For the Court - by Direction.

/s/ WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed March 29, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer; and
GARBER, Officer,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of

certiorari to this court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court - by Direction.

/s/ WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed March 19, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant; et al,

Appellees.

ORDER

The appellees' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is denied by an evenly divided court.

Entered at the direction of Judge Phillips for a panel consisting of Judge Winter, Judge Butzner. Judge Russell, Judge Widener, Judge Hall, Judge Murnaghan and Judge Chapman would have granted rehearing en banc.

For the Court

/s/ WILLIAM K. SLATE, II
CLERK

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

December 30, 1981

TO: Norman A. Townsend, Esq.
Sebastian K. D. Graber, Esq.
David R. Lasso, Esq.
Charles G. Flinn, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 79-6310 this date.

The Court's opinion is enclosed.

* * *

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer;
and GARBER, Officer,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria.
Albert V. Bryan, Jr., District Judge.

Argued June 2, 1981 Decided December 30, 1981

Before WINTER, BUTZNER,
and PHILLIPS, Circuit Judges.

Norman A. Townsend (Sebastian K. D. Graber, Graber, Stetler and Townsend on brief) for Appellant; David R. Lasso, Assistant County Attorney (Jerry K. Emrich, Arlington County Attorney on brief) for Appellees.

PHILLIPS, Circuit Judge:

Prosise appeals the district court's grant of summary judgment dismissing his claims under 42 U.S.C. § 1983 that Arlington County, Virginia police officers violated his constitutional rights by using excessive force in arresting him and by conducting a search and seizure in violation of the fourth and fourteenth amendments. The district court held that the officers' use of force was reasonable and not excessive under the circumstances and that the search and seizure claim was precluded by Prosise's guilty plea in the related state court criminal prosecution. We affirm the district court's dismissal of the excessive force claim, but we reverse and remand the search and seizure claim for further proceedings because we do not think the state conviction based on a guilty plea should preclude litigation of that claim.

I

In September 1977, the defendants, County Police Officers Haring, Trumble, Beuchert and Garber, answered a radio call about a domestic disturbance. Arriving at the scene, the officers saw Prosise and a woman, Katherine Denny, at the window of the apartment. Both Prosise and Denny yelled to the officers that the other had a gun, and Prosise held his arm out of the window showing a wound where Denny had stabbed him.

Prosise called to the officers that he would let them in if they came up.

The officers went up the stairwell and stood outside the door on a landing. They announced themselves and attempted unsuccessfully to open the door. After hearing two gunshots, they drew their guns and tried to kick the door in. At that moment, Prosise - who is six feet four inches tall - opened the door and greeted the officers with two handguns in his left hand. The officers ordered him to back away and drop his weapons. He refused to do so, even when one officer pointed a gun at his chest and repeated the order. Fearing that he might use his weapon, the officers seized him and sought to disarm him by force.

A scuffle ensued, during which the officers subdued and disarmed Prosise. He was handcuffed and taken into custody and was later treated at a local hospital for abrasions. Prosise claims that the officers struck him in the cheek with a pistol during the scuffle, while Trumble remembers only that he struck him with his fist in order to disarm him.

After Prosise was taken away, Denny told the officers that Prosise was manufacturing drugs and that he kept them in a closet. She led them to a closet and showed them a baggie she said

contained "PCP" (phencyclidine or "angel dust") and the substances and devices which she said Prosise used in making PCP.

The officers did not seize any of the articles but called Narcotics Detective Allen to the scene. This practice is standard when drugs of this nature are involved because the chemicals are often volatile and can be dangerous. Detective Allen noticed a smell of ether, saw the chemicals in the closet and concluded that these chemicals were probably being used to manufacture PCP. Allen left the two remaining officers to secure the area and went to the magistrate for a search warrant. Allen returned with a search warrant, and the officers searched the apartment, seizing the chemicals and drug paraphernalia.

Prosise was later charged in a state prosecution with a count of manufacturing phencyclidine and a count of possession of phencyclidine. He executed a plea agreement wherein he was to plead guilty to the count of manufacturing in return for a *nolle prosequi* of the count of possession. The Arlington Circuit Court accepted his guilty plea. At the hearing, Detective Allen testified about the search of Prosise's apartment, explaining that a chemist had identified the chemicals seized as being PCP in various stages of manufacture.

At sentencing some weeks later, Prosise attempted to withdraw his guilty plea. The court denied Prosise's motion to withdraw the plea and imposed a sentence of fine and imprisonment. The Virginia Supreme Court denied his petition for writ of error challenging the voluntariness of his plea and the refusal of the trial court to permit the withdrawal of the plea. *Prosise v. Commonwealth*, Record No. 78-1479 (July 17, 1979).

Prosise then commenced this action in the United States District Court for the Eastern District of Virginia alleging, under 42 U.S.C. § 1983, a denial of his constitutional rights under color of state law. He claimed, among other things, that the officers had used excessive force during this arrest and had engaged in an illegal search and seizure. The district court dismissed all but these two claims, and the defendants moved for summary judgment as to them.

The district court granted summary judgment for the defendants on the excessive force claim, based on the uncontradicted sworn statements of the officers explaining the circumstances of their use of force, and on the fourth amendment claim, on the basis that recovery was precluded by Prosise's guilty plea. This appeal followed.

Prosise contends here that his verified complaint sufficiently stated a cause of action under § 1983 for the use of excessive force, and that it was uncontradicted by the defendants' affidavits supporting their motion. The defendants did not deny his allegation that he was "pistol-whipped." At the very least, then, he is entitled to a plenary evidentiary hearing. He further contends that, on the authority of *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), this court should enter summary judgment in his favor.

Second, he argues that he is not precluded by his guilty plea from maintaining a § 1983 action against the arresting officers for illegal search and seizure. Under the Supreme Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), holding that the conventional doctrines of collateral estoppel are to be applied to § 1983 claims, he contends that his fourth amendment claim is not precluded because it was not actually litigated in the state criminal action.

II

We consider first Prosise's claim that unconstitutionally excessive force was used in his arrest. Although we agree with Prosise that on the summary judgment record there is a factual dispute as to the exact details of the arrest encounter, we agree with the district court that

even on the facts as Prosise alleges them the force used to subdue him was not under the circumstances constitutionally excessive.

The rule applied in *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), does not help Prosise. The encounter here alleged was, on Prosise's own account, one quite different from that in *King*. Prosise, a very large man, held two handguns and refused to drop them on command. There is no suggestion that the officers applied any force subsequent to disarming and subduing him. This situation is simply unlike that in *King* where force was applied to one safely in custody "maliciously and sadistically for the very purpose of causing harm," *id.* at 73 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)), but is manifestly one where the officers acted in a reasonable, hence good faith, effort to subdue an armed man who was plainly resisting lawful authority and posing a real threat of harm. We therefore agree with the district court that on the facts as stated in Prosise's verified complaint the defendants were entitled to summary judgment on this claim.

III

The district court held that Prosise was absolutely precluded in respect of his fourth amendment claim on two bases: (1) that, though the question of the search and seizure's legality

had not been "fully litigated" in the state criminal action, *cf. Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977) (actual litigation results in preclusion), the "plea of guilty estops him" because it "necessarily implied that the search...was lawful." *Prosise v. Haring, et al.*, C.A. No. 79-105-AM, slip op. at 5, 6 (E.D. Va. April 17, 1979); and (2) that, in any event, under *Tollett v. Henderson*, 411 U.S. 258 (1973), and its progeny, the guilty plea had the effect of waiving the antecedent constitutional objection since that objection was neither related to factual guilt or innocence nor to the right of the defendant not to be tried. *Prosise*, slip op. at 6, 7.

A

On the waiver basis for decision, we think that the specific waiver principle announced in *Tollett* properly applies only to subsequent federal habeas corpus proceedings challenging the criminal conviction. As analyzed in *Tollett*, this principle rests upon the perception that the guilty plea constitutes "a break in the chain of events" in the criminal prosecution, *Tollett*, 411 U.S. at 267, so that any subsequent habeas corpus inquiry is necessarily focused on the constitutional validity of the plea and "not the existence as such of an antecedent constitutional infirmity." *Id.* at 266. This is inapposite to the question whether a § 1983

claim based upon the "antecedent constitutional infirmity" may later be prosecuted free of any preclusive effect. In consequence, we think that whether there should be any preclusive effect is to be determined on the basis of other principles, specifically, of collateral estoppel and the full faith and credit statute, 28 U.S.C. § 1738. To those we now turn.

B

For possible guidance on these questions we withheld decision following original hearing of this appeal and reheard it on supplemental briefs following the Supreme Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), where the general problem of preclusion by collateral estoppel in § 1983 actions was presented. The decision in that case was, however, a narrowly confined one that is not of itself dispositive here. It held only that even though *Stone v. Powell*, 428 U.S. 465 (1976), may have deprived a state prisoner of a federal habeas forum to pursue a fourth amendment claim, the conventional doctrine of collateral estoppel and the full faith and credit command of 28 U.S.C. § 1738 might operate by issue preclusion to deprive him as well of the alternative § 1983 forum for pursuing it. *McCurry*, 449 U.S. at 103-05.

Specifically not decided by the *McCurry* Court was the question "*how* the body of collateral-estoppel doctrine or 28 U.S.C. § 1738 should apply," *id.* at 105 n.25 (emphasis in original), including the question "whether any exceptions or qualifications within the bounds of [the] doctrine might ultimately defeat a collateral-estoppel defense," *id.* at 95 n.7, in a subsequent § 1983 action. But the Court was at special pains to point out that the collateral estoppel doctrine to be applied is the "conventional doctrine" rather than any "new, more stringent" one, and, most specifically, that it is not one which "turns on the single factor of whether the State gave the federal claimant a full and fair opportunity to litigate [the] federal question." *McCurry*, 449 U.S. at 95 n.7.[1]

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[1]This last point, that collateral estoppel in § 1983 actions cannot be based solely upon the fact that a full and fair opportunity to litigate the federal issue was provided in state court, was made in specific response to the dissent's suggestion that this was the import of the majority opinion. *Allen v. McCurry*, 449 U.S. at 113 & n.12 (Blackmun, J., dissenting).

We understand the court's position to be that a state's failure to provide full and fair opportunity to litigate the issue might, within the conventional doctrine, *avoid* an otherwise appropriate application of collateral estoppel, *see Re-*

(footnote continued)

McCurry essentially, therefore, merely confirmed the general principle that had already been applied in earlier decisions of this court that under appropriate circumstances collateral estoppel might, within traditional bounds, apply to defeat § 1983 constitutional claims because the dispositive issues had earlier been decided adversely to the federal plaintiffs in state criminal actions. *See Wiggins v. Murphy*, 576 F.2d 572 (4th Cir. 1978) (per curiam) (attempt by § 1983 action to have state convictions expunged on federal grounds); *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977) (sixth amendment claim). To this general confirmation *McCurry* added only the point - on which we had expressed reservation in *Rimmer*, 567 F.2d at 276 - that this preclusion principle is not displaced with respect

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(footnote continues)
Statement (Second) of Judgments § 68.1 (1980), rather than the obverse, that provision of the full and fair opportunity, standing alone, gives rise to collateral estoppel. As the *McCurry* dissent points out, *Allen v. McCurry*, 449 U.S. at 113 & n.12, the effect of the latter would be to equate § 1983 collateral estoppel (issue preclusion) with bar (claim preclusion) under which the § 1983 claimant would be precluded from litigating any issue that *might* have been raised in the state criminal action. The majority flatly disclaimed this as its holding and we are of course bound by that perception.

to fourth amendment claims by the nonavailability under *Stone v. Powell* of an alternative federal habeas forum. And it emphasized, to an extent our decisions to date perhaps have not, the primary importance of the command embodied in 28 U.S.C. § 1738 to seek in the law of the judgment state the precise rule of conclusiveness to be applied to its criminal judgment.

Not therefore decided by the *McCurry* Court - indeed not specifically before it on the facts of that case[2] - was the narrow question which we address and to which we expressly confine decision here. That question is whether, and if so under what circumstances, a state court judgment entered on a guilty plea may be preclusive in a federal § 1983 action of an issue which in the state action was not actually litigated and could only have been litigated in relation to the exclusion of evidence on fourth amendment grounds.

We note preliminarily that this is a different question than the more inclusive one whether a guilty plea judgment may be preclusive as to any § 1983 issue, and the related one whether it may be preclusive as to an issue, that was an essential

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[2]In *McCurry* the state conviction was not based on a guilty plea but resulted from a trial following pre-trial denial of a motion to suppress evidence on fourth amendment grounds.

element of the state crime charged. To answer the narrow question we address is not necessarily to answer either of the others, and we expressly reserve decision on them.

It is also obviously a different question from those already authoritatively answered by our decisions in *Wiggins v. Murphy*, 576 F.2d 572, *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273, and, most recently, *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (per curiam), in each of which we gave issue preclusive effect in § 1983 actions to state judgments of conviction based upon adjudications of guilt rather than guilty pleas.[3] We therefore address it as a question of first impression on which our earlier decisions applying collateral estoppel in § 1983 cases are not dispositive.

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[3]In both *Rimmer* and *Wiggins* the specific constitutional violations charged in the § 1983 actions had been actually litigated in the state criminal trials as defenses or objections necessarily determined adversely to the state defendants. In *Cramer* the fundamental constitutional violation charged in the § 1983 action - an illegal search and seizure resulting in an alleged malicious prosecution - was not actually litigated at any stage, but as in both *Rimmer* and *Wiggins* the state judgment resulted from conviction after a trial. In *Cramer* we spoke of the defendant's failure to raise the constitutional objection at any stage as a "waive[r]." 648 F.2d at 945. *See* note 15 *infra*.

(1)

Under the command of 28 U.S.C. § 1738, *see McCurry*, 449 U.S. at 97-98 & n.11, we look first to the law of Virginia to determine whether, and to what extent, that state would give preclusive effect to the criminal judgment here in issue.[4]

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[4]The exact operation of § 1738 and its relationship to general policies of res judicata in the § 1983 context is not wholly clear. The questions have only emerged as potentially important ones with the relatively recent burgeoning of § 1983 litigation. *See generally Restatement (Second) of Judgments* § 134, Comment *d* (1980). Prior to the decision in *Allen v. McCurry*, there was a divergence of views about the relationship between § 1983 and § 1738 among both courts and commentators. *See generally* Comment, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. Mich. J. of L. Ref. 465, 486-88 (1981). It may well persist after *McCurry*. In that decision the Court did not directly address the question of the relationship between the two, but while apparently assuming their congruence, seemed also to suggest primacy for the command embodied in § 1738. *See McCurry*, 449 U.S. at 94-96. It is generally assumed that the command is to give to the state judgment the same effect - no more and no less - that the state courts would give it. *See Restatement (Second) of Judgments* § 134, Comment *g* (1980). In combination these principles of primacy for the state rule and exact enforcement of the state judgment according to its dictate would create a problem if the state rule were found to be at flat odds with "conventional doctrine." We do not face that problem here, since we find both the state rule and general principles of collateral estoppel to be sufficiently uncertain in their application to the particular

(footnote continued)

The Virginia decisions to which we have been directed do not yield a definitive answer. None has addressed the precise, narrow question of the preclusive effect of a guilty plea judgment upon issues that in the state criminal prosecution could only have been relevant to determining the admissibility of evidence. On broader questions of the preclusive effect of criminal judgments, the state's highest court stated in 1958 that the general rule in Virginia remained that expressed in 1916 in *Supervisors of Tazewell County v. Norfolk & Western Railway Co.*, 119 Va. 763, 91 S.E. 124 (1916) that

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Aetna Casualty & Surety Co. v. Czoka, 200 Va. 385, 105 S.E.2d 869, 872 (1958). In *Czoka*, a

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(footnote continues)
kind of issue here involved that no choice is forced. In consequence, we can reserve that thorny question for another day.

person in privity with the civil defendant had pled guilty to an offense that had as an essential element a dispositive issue in the civil action before the court. The plaintiff sought preclusive effect as to this issue from the criminal conviction. Applying the general rule from *Tazewell County*, the court refused any preclusive effect. The next year this general rule was again recognized, in dictum, as applying to criminal judgments, in *Smith v. New Dixie Lines, Inc.*, 201 Va. 466, 111 S.E.2d 434 (1959) (dictum: party sought to be precluded not party to criminal action nor otherwise bound by criminal judgment). So far as our research discloses, these two decisions remain the most recent pronouncements and applications of Virginia's general rule relating to the preclusive effect of *criminal* judgments.

To this general rule against preclusion, the Virginia courts have apparently applied only one narrow exception. A plaintiff, previously convicted of arson, has been held precluded by the conviction from recovering the proceeds of a fire insurance policy covering the building he was found guilty of burning. *Eagle, Star & British Dominions Insurance Co. v. Heller* 149 Va. 82, 89, 140 S.E. 314, 316 (1927). Subsequent decisions, adhering to the general rule, have simply recognized *Heller* as an exception to it. *See Smith v.*

New Dixie Lines, Inc., 201 Va. 466, 472-73, 111 S.E.2d 434, 438-39 (1959); *Aetna Casualty & Surety Co. v. Czoka*, 200 Va. 385, 389, 105 S.E.2d 869, 872 (1958).

These Virginia decisions seem, therefore, to establish that, except in the narrow context of the arson conviction in *Heller*, criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect in subsequent civil litigation.[5] Virginia's narrow rule of preclusion as announced in *Heller*, where conviction was by adjudicated guilt and where the issues precluded were esential elements of the crime charged, does not by necessary implication apply to the preclusive effect of guilty plea judgments upon other issues than those constituting essential elements of the crime. As indicated, that precise question has not, so far as our research discloses, been authoritatively addressed by the Virginia courts.

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[5]Virginia's general rule against preclusion by criminal judgments is rested upon the mutuality requirement, *see Aetna Casualty & Surety Co. v. Czoka*, 200 Va. 385, 105 S.E.2d 868, 872 (1958), a requirement that the Supreme Court of Virginia has recently declined to abandon, at least in cases of attempted "offensive" use. *Norfolk & Western Railway Co. v. Bailey's Lumber Co.*, 221 Va. 638, 272 S.E.2d 217 (1980) (citing *Aetna Casualty & Surety Co. v. Czoka* in support, but recognizing the *Heller* exception where defensive use was involved).

(2)

When we look to general principles of collateral estoppel, either as a guide to Virginia's likely view were the precise question presented to its highest court or as an independent source for the proper application of collateral estoppel doctrine to our issue,[6] the answer is again not definitively given.

It cannot be found with certainty in the recent *Restatement (Second) of Judgments* (1980), taking that as perhaps the best possible source for a responsible statement of "conventional doctrine" in this realm. This important secondary authority suggests that as a general proposition criminal judgments based upon guilty pleas can have no collateral estoppel effect as to *any* issues, because by definition none has been "actually litigated," *Restatement (Second) of Judgments* § 133, Comment *b* (1980), a fundamental predicate for issue preclusion in the Restatement's formulation, *see id.* § 68, Comment *e*. This general proposition is immediately hedged, however, by the concession that "[a] defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts *representing the elements of the*

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[6]See note 4 *supra*.

offense...not [as] a matter of issue preclusion...but [as] a matter of the law of evidence...," *Id.* § 133 Comment *b* [emphasis added].

This concession is forced by a significant number of decisions,[7] including several by other

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[7]These decisions have recently been collected in Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 Iowa L. Rev. 281 & nn. 122-25 (1980); Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 Cornell L. Rev. 464, 478-83 (1981) [hereinafter cited as *Modest Dissent*] in the course of that respected commentator's challenge to the *Second Restatement's* general position that an essential predicate for collateral estoppel is that the issues shall have been "actually litigated." The existence of these decisions is of course recognized in the *Second Restatement*, but their results, though conceded to be possibly "correct," are there ascribed to estoppel principles derived from the law of evidence rather than from traditional res judicata doctrine. *Id.* § 133, Comment *b*; Reporter's Note, Comments b and c. Many of the cases, however, clearly reveal an assumption that res judicata/collateral estoppel doctrine is being applied. Freed of any "mutuality" and "actually litigated" requirements, collateral estoppel doctrine would of course clearly apply, and Professor Vestal so explains the cases. *See* Vestal, *Modest Dissent*, *supra*, at 478-83. For our immediate purposes we have to assume that these decisions constitute elements in the body of "conventional" collateral estoppel doctrine to which *McCurry* requires our attention, notwithstanding the indications of a lack of scholarly consensus on the exact shape of that doctrine.

federal courts of appeals,[8] that have rather routinely found estoppel arising from guilty pleas notwithstanding the lack of actual litigation of the critical issues. With only a few exceptions,[9] these decisions finding preclusion in guilty pleas have concerned issues that represented elements of the crime charged. As to such "element-issues" it can with reason be said - and has been said in various ways - that though not actually litigated they have necessarily been judicially admitted by the plea, so that the criminal defendant is estopped to contest them in subsequent civil litigation. *See e.g., Brazzell v. Adams,* 493 F.2d 489, 490 (5th

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[8] *Brazzell v. Adams*, 493 F.2d 489 (5th Cir. 1974) (§ 1983 action); *Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977) (diversity action); *Hernandez-Uribe v. United States,* 515 F.2d 20 (8th Cir. 1975) (criminal action); *Ivers v. United States,* 581 F.2d 1362 (9th Cir. 1978) (federal civil action). All these decisions applied preclusion to issues which represented essential elements of the crime to which a guilty plea had been entered.

[9] *See Metros v. United States District Court for District of Colorado,* 441 F.2d 313 (10th Cir. 1971) (false arrest; illegal search); *Hooper v. Guthrie,* 390 F.Supp. 1327 (W.D. Pa. 1975) (false arrest; false imprisonment); *Palma v. Powers,* 295 F.Supp. 924 (N.D. Ill. 1969) (§ 1983 action for illegal search and seizure) (result criticized in Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems,* 66 Cornell L. Rev. 564, 581-84 (1981) [hereinafter cited as *Revisiting*], in the course of that author's response, as Reporter for the *Second Restatement,* to Professor Vestal's critique).

Cir. 1974); *Hernandez-Uribe v. United States*, 515 F.2d 20, 21 (8th Cir. 1975); *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978). If this then be conventional - or at least plainly emerging - doctrine respecting element-issue preclusion by guilty plea, the question remains whether it should apply as well to non-element issues, specifically, for our purposes, to the potential but unlitigated issue whether specific evidence of the crime should be suppressed on fourth amendment grounds.

(3)

Assuming, without deciding, that a state judgment based on a guilty plea should ordinarily[10] have preclusive effect in a later § 1983 action as to all issues representing essential elements of the crime, we do not think it should have preclusive effect as to potential but not actually litigated issues respecting the exclusion of evidence on fourth amendment grounds. There is a critical distinction, grounded in fundamental policies respecting the proper application of collateral estoppel, between the two types of issues.

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[10]Subject of course to the possible application of various "qualifications and exceptions" that within conventional doctrine may make collateral estoppel inappropriate in a particular case, including most fundamentally a lack of full and fair opportunity to litigate. *See McCurry*, 449 U.S. at 95 & n.7.

It related to the assurance that there was adequate *incentive* in the criminal proceeding fully to litigate the issue sought to be precluded.

Whatever the difference among courts and commentators as to the "actually litigated" requirement for issue preclusion, there has been general agreement - to the point of convention - that among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had not only a full and fair opportunity but an adequate incentive to litigate "to the hilt" the issues in question.[11] *See generally Restatement (Second) of Judgments* § 68.1(e)(iii), Comment (1980). With respect to issues representing the very elements of the crime charged, the adequacy of incentive to contest may be thought manifest in relation to any guilty plea. But it is not necessarily manifest with respect to potential but

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[11]It is possible to analyze the basic point of difference between the *Second Restatement*'s position and that of Professor Vestal on guilty plea preclusions as going as much to how and by whom "adequate incentive" is to be shown as to whether the "actually litigated" requirement has general application in collateral estoppel doctrine. *See Hazard, Revisiting, supra* at 584. But there is no disagreement that adequate incentive is a critical component of collateral estoppel.

unlitigated issues related to the exclusion of evidence on fourth amendment grounds.[12] A moment's reflection shows why.

Despite the most egregious violation of fourth amendment rights, it is quite conceivable that a state criminal defendant has no real incentive to seek suppression of the resulting evidence because the state has so sufficient an amount of untainted evidence that making the effort would in the end be futile and possibly even harmful to the defendant's immediate interests. In that situation, while a guilty plea might be thought, despite the lack of actual litigation, to be properly preclusive of element-issues, we think it should not be preclusive of the search and seizure issue. On the other hand, there is always the possibility that in a particular case a guilty plea has been entered when the only available evidence on critical issues was search and seizure evidence. In that situation, there was obviously as

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[12]Lying perhaps between these two types of issues and presenting still different sets of considerations are issues that in the criminal action represented not elements of the crime but of potential absolute affirmative defenses such as entrapment or stop-gap objections that had no evidence exclusion implications. On these we reserve decision, simply noting that each presents incentive-to-litigate problems that may differ in critical respects from those presented by evidence-suppression issues.

much incentive to litigate the suppression issue as any representing essential elements of the crime, and if preclusion is finally to turn on incentive, it should in that situation result as well for the evidentiary as for the element-issue.

This could of course be determined on a case by case basis, with the question whether the one situation or the other was present being addressed in the § 1983 action as one of fact incident to determining the collateral estoppel defense. *Cf. Restatement (Second) of Judgments* § 68, Comment *f* (1980) (extrinsic evidence to determine what issues litigated). Fair resolution of this factual question could be expected, however, frequently to be difficult. Relevant evidence would consist of such state court records of proceedings incident to the guilty plea as might be available and any extrinsic evidence bearing upon the scope of the state's evidence and the defendant's knowledge of it at the critical time. It is of course true that however sparse and ambiguous this evidence might be, the incentive question could and would nevertheless finally be resolved in every case, as are many other difficult issues, through the ultimately decisive leverage of proof burdens.[13] But while the question could always in

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[13]That the proper cast of this burden might itself present a difficult problem, *see Hazard,*

(footnote continued)

the end be resolved by the usual processes, many times fairly and occasionally even rather easily, we think that on balance the game is not worth the candle. The question is so likely to be one incapable of fair and expeditious resolution in the run of § 1983 actions that we believe a general rule of non-preclusion should obtain with respect to search and seizure issues in guilty plea cases.

Such a rule, we think, is amply justified by those general policies which emphasize the need for judicial flexibility in accommodating conflicting values of finality, fairness, and public confidence in applications of res judicata. *See generally Restatement (Second) of Judgments*, Ch. 1, Introduction pp. 12-15 (1980); *id.* § 68.1. It is conformable under 28 U.S.C. § 1738 to Virginia decisions respecting the preclusive effect of its criminal judgments.[14] And it is compatible with our own prior decisions respecting the estoppel effect of state criminal judgments in § 1983 actions.[15]

(footnote continues)

Revising, supra at 584. The problem is not of course before us, but its existence may properly be taken into account as an added difficulty in resolving the incentive question on a case by case basis.

14 *See* Part III B (1).

15 *See* cases cited at note 3 *supra*. As there indicated, in all three of the cases, *Wiggins,*

(footnote continued)

The price exacted by such a flat rule of non-preclusion is the opportunity it affords state prisoners who pled guilty in state courts to litigate for the first time in § 1983 actions search and seizure issues that might have been but were

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(footnote continues)

Rimmer, and *Cramer*, in which we have given issue preclusive effect in § 1983 actions to state court judgments of conviction, the judgments were based upon adjudications of guilt after trial. None involved guilty pleas. Additionally, in both *Wiggins* and *Rimmer*, the issues precluded had been "fully litigated" and determined adversely to the § 1983 plaintiff in the state criminal action. This further distinguishes those decisions in a critical respect. In *Cramer*, the precluded issue had not been fully litigated in the state criminal action where it was potentially an evidence suppression issue. *Cramer* is therefore the case in the trilogy most like the instant case in those respects critical to application of collateral estoppel doctrine: there, as here, the issue was not an element-issue, and it was not fully litigated. But it differs in yet another critical respect which justified preclusion there but makes it inappropriate here. In *Cramer*, it was manifest from the record that the evidence used to convict in the state criminal prosecution was that obtained by the search and seizure which formed the basis for the § 1983 action. This made equally manifest the § 1983 plaintiff's "adequate incentive" to seek its suppression in the state action. It is precisely because the guilty plea obscures what was manifest in *Cramer* that we hold here against preclusion.

not raised[16] in state criminal actions. Given the obvious disincentive to forego meritorious suppression motions in the criminal action, *see McCurry*, 449 U.S. at 104 n.23, and the subsequent disincentive (however modest some may consider it) to advance frivolous search and seizure claims in the § 1983 action, we think the price not an exorbitant one in terms of judicial resources and the public interest even if there were no countervailing considerations. And there are of course such considerations. First, there is the avoidance by this means of any necessity to devote effort and resources in the § 1983 action to the resolution of a peripheral factual question of incentive that, as indicated, is likely to be difficult and frequently incapable of fair resolution in that collateral setting.

More important is the fact that since *Stone v. Powell*, 428 U.S. 465 (1976), the § 1983 federal

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[16]Still another variant on the narrow question we decide would be that presented by an unsuccessfully litigated suppression motion followed by a guilty plea. Whether that situation should be thought controlled by our "fully litigated" decisions, or by this one, or be treated as presenting still different collateral estoppel problems, we need not here decide. *See, e.g., Restatement (Second) of Judgments* § 41, Comment *g* (1980) (finality for issue preclusion purposes); *id.* § 68.1(a), Comment *a* (effect of inability to obtain appellate review).

forum is the only one available for assertion of this particular constitutional claim. Though the Supreme Court has specifically rejected this as a sufficient reason for blanket disallowance of collateral estoppel in § 1983 actions involving fourth amendment claims, *McCurry*, 449 U.S. at 102-05, it remains a legitimate reason - well within "conventional doctrine" - for systematically disallowing it in the narrow and concededly marginal circumstance for applying collateral estoppel that is created by guilty pleas. See generally *Restatement (Second) of Judgments* § 88, Comments *b* and *d* § 68.1(e), Comment *g* (1980); *see also Allen v. McCurry*, 449 U.S. at 115 (Blackmum, J., dissenting) (emphasizing different case of search and seizure issues in the two proceedings).

IV

For the reasons given in Part III, we reverse and remand for further proceedings consistent with this opinion that portion of the judgment of the district court which dismissed, on waiver and estoppel grounds, Prosise's search and seizure claim. For reasons given in Part II, that portion of the judgment dismissing Prosise's excessive force claim is affirmed.

AFFIRMED IN PART
REVERSED AND
REMANDED IN
PART

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 79-105-AM

JOHN FRANKLIN PROSISE,

Plaintiff,

v.

LT. GILBERT A. HARING, et al.,

Defendants.

ORDER

The Court has received defendants' answer, motion to dismiss or for summary judgment, memorandum in support of that motion and supporting affidavit of facts. These pleadings respond to plaintiff's allegations that defendants used excessive force during plaintiff's arrest and that the search warrant issued to authorize the search of his apartment was defective, thereby making the search and seizure illegal.

With respect to plaintiff's first claim of excessive force, defendants submit the following: that on September 7, 1977, several of the defendants, who were Arlington County police officers, responded to a call for assistance made by the plaintiff; that upon arrival at plaintiff's apartment

the officers saw plaintiff and his fiance, Katherine Denny, at the window and heard them accuse each other of holding a gun; that upon approaching the door of plaintiff's apartment the officers heard Denny shout that "he has a gun;" that after announcing themselves the officers attempted unsuccessfully to open the door; that the officers then heard two gunshots and promptly drew their weapons; that plaintiff opened the door and stood in the doorway holding a revolver and a pistol; that plaintiff was told to drop his weapons but refused to do so; that the officers then seized plaintiff and attempted to disarm him by force; that a brief scuffle ensued during which defendant Trumble struck plaintiff with his fist to force plaintiff to drop his weapons; and that plaintiff was thereafter disarmed, handcuffed and taken into custody.

These sworn representations entitle defendants to summary judgment on claim (1). Plaintiff's possession of two weapons and refusal to drop them upon request by police officers fully justified the reasonable use of force to disarm plaintiff. The fact that plaintiff was six foot four inches tall and was engaged in a heated argument involving weapons further support the reasonable use of force to ensure the officers' safety. Even accepting as true plaintiff's allegation that Of-

ficer Trumble jabbed him hard with his pistol and threw plaintiff toward a couch, the Court views these acts as reasonable responses to the threat posed by an armed and uncooperative individual. Although plaintiff alleges that Officer Beuchert struck him in the head with a pistol butt with enough force to fracture plaintiff's cheekbone, defendants' affidavit does not indicate that such a blow was struck. The Court concludes that defendants deny that Officer Beuchert delivered such a blow since defendants' sworn affidavit, purporting to recite the events in question, omits any reference to a pistol-whipping. The Court relies on this sworn affidavit in arriving at the conclusion that defendants used reasonable force in subduing plaintiff and therefore are entitled to summary judgment. As indicated below, the award of summary judgment is made conditional for the purpose of affording plaintiff an opportunity to submit an affidavit that contradicts defendants' version of the facts in question, particularly the actions of Officer Beuchert with reference to the alleged pistol-whipping.

In his second claim plaintiff attacks the validity of the search warrant obtained by the defendants to authorize the search of plaintiff's apartment. In his complaint plaintiff stated that the search warrant obtained to seize chemicals and devices used to manufacture phencyclidine

(PCP) contained "false information" that was used to "set up" the plaintiff. In an attempt at explanation plaintiff asserted that the search warrant was directed at chemicals in the living room whereas in reality they were located in the closet; he further contended that the officers who executed the warrant (defendants Allen and Badey) emptied out some of the contents of the chemical bottles in order to create the appearance of use by the plaintiff. He further charges officers Allen and Badey with seizing chemicals that were not authorized to be seized in the warrant and with moving chemicals around so that they would appear in plain view. Finally, plaintiff maintains that Officer Beuchert exceeded the scope of the search warrant by seizing drugs out of a shirt located in the bathroom.

Defendants contend that plaintiff is collaterally estopped from contesting the validity of the search warrant because he pled guilty to a charge that was predicated on the fruits of the search. They also present an alternative argument suggesting that the search warrant was valid and supported by an appropriate affidavit (see defendants' exhibit A) and that the officers did not exceed the scope of the warrant.

The Court is also convinced of the validity of the warrant and subsequent search. Certainly

detective Allen's affidavit, based upon his own observations and the statements of Katherine Denny, were sufficient to make the requisite showing of probable cause. *Berger v. New York*, 388 U.S. 41 (1967); *United States v. Ventresca*, 380 U.S. 102 (1965). Moreover the scope of the search did not exceed the items set forth in the search warrant.[1] *Andresen v. Maryland*, 427 U.S. 463 (1976). But the disposition of plaintiff's fourth amendment claim should not, at this stage, be based upon its merits where, as here, defendants assert that collateral estoppel bars any consideration of the merits in the first instance. In support of this argument defendants refer the Court to the Fourth Circuit's recent decisions in *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977), and *Wiggins v. Murphy*, 576 F.2d 572 (4th Cir. 1978). Those cases, however, do not stand for the proposition suggested by the defendants. In *Rimmer* the court held that the doctrine

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[1]The Court also notes that the search of plaintiff's apartment can in part be upheld as a consent search because Ms. Denny, who also resided at the apartment, led officers to a hall closet containing PCP and apparatus used in its manufacture. Since Ms. Denny possessed "common authority" over the premises, the search can be justified without regard to a warrant. *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Carter*, 569 F.2d 801 (4th Cir. 1977).

of collateral estoppel foreclosed assertion of a state prisoner's claim that identification testimony was unconstitutionally admitted into evidence because the issue was precluded by the standing state conviction. The *Rimmer* court explicity refrained from deciding the availability of a § 1983 cause of action where there is no right of access to a federal habeas forum. The court recognized that such a situation could arise with respect to fourth amendment claims because the Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), normally would foreclose state prisoners from litigating such claims in a federal habeas forum.

The *Rimmer* decision suggests that collateral estoppel applies only to those issues which can be presented a federal habeas forum. *Von Lusch v. C & P Tel. Co.*, 457 F.Supp. 814 (D. Md. 1978). That suggestion is implicit in the *Rimmer* court's observation that "[s]ince it was the general intention of the Civil Rights Act to provide access to a federal forum for the adjudication of federal constitutional rights, the Civil Rights Act itself may present a bar to foreclosure of the issue in those cases [in which federal review is otherwise unavailable]." 567 F.2d at 276. Since a fourth amendment claim normally is not subject to

federal habeas review,[2] plaintiff in this action would be unable to litigate his claim of illegal search and seizure unless he is permitted to do so under § 1983.[3]

This case is complicated, however, by the fact that plaintiff's conviction was secured through a plea of guilty. This additional factor was not present in *Rimmer*, wherein the § 1983 plaintiff had actually litigated at trial his claim that a witness' identification testimony was inadmissible. *See* 567 F.2d at 275. Thus the plaintiff there was collaterally estopped from raising this claim in a § 1983 action because he "fully litigated the question he now tenders in the course of his criminal trial...." *Id.* at 276. In this case there was no criminal trial and the search and seizure question was not "fully litigated" as it was in *Rimmer*. Regardless of whether this distinction removes this case from the purview of *Rimmer*, however, the Court believes that plaintiff's plea of guilty estops him from asserting a fourth amendment claim in a § 1983 suit. The plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful. *See*

2*See Stone v. Powell, supra.*

3*See Christine M. Fore, et al. v. W. G. Newell*, Civil Action No. 78-417-AM, pp. 8-9 n. 3 (E.D. Va. October 10, 1978).

Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974); *Meadows v. Evans*, 550 F.2d 345, 351-53 (5th Cir. 1977) (per curiam) (Tjoflat, Jr., concurring in part and dissenting in part). While the plea did not include an admission of the elements of the crime such as in *Brazzell*, it did admit the facts necessary to subject the plaintiff to criminal liability. Most important, the Supreme Court has held that deprivation of constitutional rights occurring prior to a guilty plea may not be asserted in subsequent proceedings. *Tollett v. Henderson*, 411 U.S. 258 (1973); *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

In *Tollett* the Court held that a state prisoner who tenders a guilty plea may not thereafter assert on federal habeas corpus constitutional claims that relate to events that occurred prior to entry of the plea.[4] The question is

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[4]The pervasiveness of the holding in *Tollett* was somewhat limited by two subsequent decisions. In *Blackledge v. Perry*, 417 U.S. 21 (1974), the Court held that a guilty plea did not bar a prisoner's complaint that his conviction violated due process concerning "the right not to be haled into court at all...." *Id.* at 30. One year later the Court decided that a guilty plea did not bar a prisoner's double jeopardy claim. *Menna v. New*

(footnote continued)

whether this rule of preclusion should apply when a fourth amendment claim, which could not in most instances be raised in a federal habeas petition, is presented in a § 1983 suit. Two values conflict here; the interest, discussed above, in affording this plaintiff access to the § 1983 forum and the "waiver" effect attendant to a guilty plea adverted to by the *Tollett* Court. Certainly a claim of illegal search and seizure is the kind of non-jurisdictional defect that a defendant may not thereafter assert in a habeas corpus petition under *Tollett*. As the Court later explained in *Menna v. New York*, 423 U.S. 61, 62-63 n. 2 (1975) (per curiam), a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established."

Recent decisions of the Supreme Court establish beyond doubt that search and seizure claims are unrelated to the existence of "factual guilt." *Stone v. Powell, supra* at 489-90; *United*

(footnote continues)

York, 423 U.S. 61 (1975) (per curiam). *See also United States v. Bluso*, 519 F.2d 473 (4th Cir. 1975); *United States v. Sams*, 521 F.2d 421 (3d Cir. 1975); *Williams v. State of Md.*, 445 F.Supp. 1216 (D. Md. 1978).

States v. Janis, 428 U.S. 433 (1976); *Kaufman v. United States*, 394 U.S. 217 (1969). Notwithstanding the unavailability of the federal habeas forum under *Stone*, therefore, plaintiff's fourth amendment claim would not be cognizable in any event because his plea of guilty foreclosed access to habeas corpus under *Tollett*. It follows that the considerations referred to above that may make appropriate the availability of the § 1983 cause of action because of the preclusive effect of *Stone* do not pertain to cases in which there is the added element of a guilty plea. Plaintiff's guilty plea cut off his access to a federal habeas forum to litigate a fourth amendment claim and at the same time should have a similar effect upon a § 1983 suit. If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*. The Court thus concludes that plaintiff's fourth amendment claim cannot be maintained in this § 1983 action under the reasoning undergirding the *Tollett* decision.

For the foregoing reasons, it is hereby

ORDERED that conditional summary judgment be entered in favor of the defendants on plaintiff's claim of excessive force during arrest; summary judgment becomes final in fifteen (15) days unless plaintiff can show that the defendants' use of force was excessive. Summary judgment will be entered in favor of the defendants on plaintiff's claim of unlawful search and seizure and that claim stands dismissed.

Finally, plaintiff's numerous submissions included an affidavit from his wife, Katherine I. Prosise, that sets forth a claim that she was touched in an offensive manner by Officer Badey. This claim is unrelated to the alleged violation of her husband's civil rights, which is the subject of the suit against the defendants, and therefore must be dismissed without prejudice. Should Mrs. Prosise desire to file suit on her own behalf based on her claim of assault, she is free to do so in a separate action.

The Clerk is directed to send copies of this Order to the plaintiff and to the County Attorney for Arlington County, Virginia.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
April 17, 1979

PLEA AGREEMENT TRANSCRIPT

April 27, 1978

(Begin Transcript page 6)

Whereupon,

DETECTIVE HENRY ALLEN,

was called as a witness by and on behalf of the Commonwealth of Virginia, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELSON:

Q State your name for the court.

A Henry W. Allen.

Q By whom are you employed?

A Arlington County Police Department. I am an officer working in the Narcotics Division.

Q How long have you been in Narcotics?

A Four and a half years.

Q How long have you been a police officer?

A Six years.

Q Directing your attention to September 7, 1977, did you have occasion around 10:00

o'clock to respond to 224 North Glebe Road, Apartment No. 4, in Arlington?

A Yes, I did.

Q Tell us why you responded there and what you found.

A I received a radio call while in the vicinity, to respond to 224 North Glebe Road, Apartment No. 4, and I (Begin Transcript page 7) responded; and there were two uniformed police officers there, and an individual named John Prosise, who had been arrested on a charge which included the possession of a controlled substance.

Q What did that substance turn out to be?

A Phencyclidine.

Q Was that taken to the laboratory?

A Yes, it was.

Q Did you receive a certificate of analysis?

A Yes, sir.

Q May I have this marked as Commonwealth's Exhibit No. 1?

(The above-mentioned certificate was marked as Commonwealth's Exhibit No. 1 for identification.)

BY MR. MELSON:

Q Is this the certificate which you received?

A Yes, sir, it is.

Q And what else occurred while you were at that address of 224 North Glebe Road?

A Upon my arrival, I smelled an odor of ether, and upon looking around, saw some chemicals about the apartment. I observed a quantity of a substance of what I believed to be (Begin Transcript page 8) PCP upon the living room table. At the time, I asked the officer to hold the place secured.

Q Do you know who the occupant of that apartment was?

A John Prosise, and Katherine Eileen Denni.

Q Did you find a lease to the apartment with his name on it?

A Yes, I did.

Q Did there come a time you were issued a search warrant for the apartment of 224 North Glebe Road?

A Yes, I did.

Q What occurred after the search warrant was issued?

A My partner, Detective Petti, and I returned to the apartment at 224 North Glebe Road and executed the search warrant on the premises at approximately 2400 hours on the 7th.

Q What was seized as a result of that search?

A The property Detective Petti and I seized included two jars of cyclohexanone, two jars of cyanide, scales, a four gallon can of Coleman's fuel, two jars of lye, assorted drug paraphernalia, a jar of iodine, a jar of hydrochloric acid, four plastic baggies of suspected PCP, four 8 ounce cans of parsley, two plastic buckets with traces of suspected PCP.

Q (Begin Transcript page 9) Did you mention anything about parsley being found?

A Yes.

Q Were any papers seized during the search?

A Assorted papers, several receipts from Norris Strong Chemical Company in Prince George's County, and customer receipts from supply places or parsley places.

Q Do you recall what was included in one of the two devices you seized?

A Yes, sir, among the personal papers I seized were two devices. One had what I believe to be a formula to make PCP, and it was later confirmed by Dr. Hepner.

Q What were the customer receipts for?

A The customer receipts were for assorted chemicals used in the manufacture of phencyclidine. I transported those to the Northern Virginia Lab, to a Mr. Davis for handwriting analysis.

Q Did they have the defendant's handwriting on it?

A It had John F. Prosise on it, and Mr. Davis confirmed that they were written by Mr. Prosise.

Q Let me show you the two laboratory certificates, these are exhibits 2 and 3. Can you identify what these exhibits are?

((Begin Transcript page 10) The above-mentioned documents were marked Commonwealth's Exhibits No. 2 and 3 for identification.)

A I received these from Mr. Davis in reference to the handwriting samples of the questioned document, and the known handwriting.

Q Did he conclude that the handwriting was that of Mr. Prosise?

A Yes, it does.

Q And the signature on the customer receipt, is that of Mr. Prosise?

A Yes, it is.

Q Did you take the chemicals to the laboratory?

A Yes, I did, I transported them to the Northern Virginia Forensic Laboratory on the 8th of September, the following day.

Q Did you receive, as a result of the analysis, a certificate of analysis?

A I turned the chemicals to Pauline Wagner, and she returned them back to me with an analysis report.

((Begin Transcript page 11) The abovementioned document was marked Commonwealth's Exhibit No. 5 for identification.)

BY MR. MELSON:

Q Let me show you first, Dectective Allen, the report which is marked as Commonwealth's Exhibit No. 5, and ask you what the chemist's second finding was.

A There were two items, one envelope containing a green material; and an item containing a white crystal type material. The chemist report states that item two was what is known as PCC, the intermediate stage of PCP.

Q How many stages are there in the manufacture of PCP?

A Two stages. The end result of the first stage, which is the intermediate, is PCC.

Q Is that what is referred to on the laboratory report?

A Yes, sir.

Q Let me show you Exhibit No. 4. Can you identify this laboratory certificate?

(The above-mentioned document was marked Commonwealth's Exhibit No. 4 for identification.)

A (Begin Transcript page 12) Yes, sir, I can.

Q From whom did you receive that?

A I received that from Pauline Wagner at the Northern Virginia Forensic Laboratory in reference to the chemicals I took out there for analysis.

Q Did she conduct an analysis of the two buckets you seized from the home?

A The two buckets were found to contain PCP.

Q Is that the complete product?

A Yes, sir.

Q Did she confirm the presence of other chemicals that were seized?

A Yes, sir.

Q Were there any other chemicals needed to manufacture PCP that were not seized from the defendant's home?

A Yes, sir, sodium metabisulfite, piperidine, bromobenzene.

Q Are any of the chemicals necessary in the first stage of the operation?

A In the first stage you must have piperidine and sodium metabisulfite may be used.

Q The completed product of the first stage was found?

A Yes, it was.

Q (Begin Transcript page 13) Do you know whether, even though the defendant had completed the first stage, he had ordered an addi-

tional quantity of sodium metabisulfite and piperidine?

A Yes, sir, I have a cancelled receipt from Norris Strong, which states an order was called in and was made for the sodium, the bromobenzene and the piperidine on September 6, 1977.

Q These would not have been needed to complete a batch?

A No.

Q What is bromobenzene used for?

A It is used in the second stage.

Q With the Grignard Reagent?

A Yes, sir, it is.

Q That was also ordered by the defendant?

A Yes, sir.

Q In that same order?

A Yes, sir.

Q When was the order made?

A September 6, 1977, and it was cancelled December 6.

Q You referred also to one of the items as being parsley?

A Yes, sir.

Q (Begin Transcript page 14) Did you find any tickets referring to an order for parsley?

A I found a copy of an order from Atlantic issued for four cases, each case containing six 8 ounce cans of parsley.

Q How many pounds is that?

A Twelve pounds.

Q How many?

A Twenty-four 8 ounce cans, 12 pounds.

Q You didn't find 10 pounds there?

A I did not.

Q Did you find any empty cases?

A I did not.

Q Do you know how much of the intermediate stage was first found by weight?

A 82.5 grams in the intermediate stage.

Q How much PCP could be made from that?

A In discussing it with Dr. Hepner at the Northern Virginia Laboratory, using the formula, he estimated it would produce 2.2 pounds, roughly.

Q Is PCP then spread over parsley?

A Yes, sir.

Q When you are saying 2.2 pounds of PCP, or 2.2 pounds of killer weed, why is the parsley used?

A (Begin Transcript page 15) In the final product it is spread over the parsley. The total amount that was seized was calculated that it would have produced about 44 grams of a finished product of PCP.

THE COURT: That is not 44 grams treated with parsley.

THE WITNESS: No, sir.

THE COURT: Do you know the amount of PCP, how much would be needed to treat it with parsley?

THE WITNESS: Dr. Hepner said 44 grams could be treated with two pounds of parsley.

BY MR. MELSON:

Q How much parsley did you find?

A Twelve pounds.

Q What is the estimated, from your experience, the market value on the street of parsley treated PCP?

A It would go from $1500 to $1700 a pound.

Q Did you mention that a 3-A triple beam balance scale was found?

A Yes, sir.

Q And is the person you are referring to John Franklin Prosise --

MR. RODWAY: (Interposing) We stipulate it is him.

MR. MELSON: (Begin Transcript page 16) We have no further questions.

MR. RODWAY: We have no questions.

MR. MELSON: There supposedly has been filed with the court copies of the originals, and if we can substitute them, I would like permission to retrieve the others.

THE COURT: I don't see the file here.

MR. MELSON: I think they are in the clerk's office in an accordian file. So, I introduce these as the copies here, and the others are the originals.

THE COURT: Let me have these. If he can have your permission to receive these --

MR. RODWAY: (Interposing) Yes, sir.

THE COURT: All right, they are received in evidence, and the copies that are in the clerk's office may be released to the Commonwealth Attorney.

(The documents marked Commonwealth's Exhibits 1 to 5 were received in evidence.)

Does the Commonweaitn have any further evidence?

MR. MELSON: No, sir.

THE COURT: Does the defense wish to present any evidence?

MR. RODWAY: No, sir.

THE COURT: (Begin Transcript page 17) The court finds the plea of guilty to be voluntarily and intelligently tendered and finds there is a sufficient factual basis; and upon the evidence heard this morning, the court finds the defendant guilty of the manufacture of phencyclidine as charged in the indictment C-12689.

Do you request a presentence report?

MR. RODWAY: Yes, sir.

THE COURT: No sentence is imposed at this time, and the case is referred to the Probation Parole Office for the preparation of a presentence report.

MR. RODWAY: He was born in Arlington and he has lived here on and off. He was in the military, and in essence he has lived a long

residence in this area, though I can't say everyone of his family was born here. His family moved away and then came back. His mother came back. He has not been any trouble.

THE COURT: June 9?

MR. MELSON: That is fine with the Commonwealth.

MR. RODWAY: Yes, sir.

THE COURT: This case is continued to June 9 for sentencing, subject to a presentence report.

Do you have a motion with respect to 12951?

No. 81-2169

Office - Supreme Court, U.S.
FILED
NOV 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GILBERT A. HARING, Lieutenant,
Arlington County Police Department;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHERT, Officer;
THOMAS TRUMBLE, Officer;
STANLEY GARBER, Officer,

Petitioners,

vs.

JOHN FRANKLIN PROSISE,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

CHARLES G. FLINN
Arlington County Attorney

DAVID R. LASSO
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Arlington, Virginia 22201
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(703) 548-2110

Counsel for Respondent

PETITION FOR CERTIORARI FILED MAY 24, 1982.
CERTIORARI GRANTED OCTOBER 12, 1982

JOINT APPENDIX

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*This was provided in the appendix to the Petition for a Writ of Certiorari but is included in the joint appendix for the Court's convenience.

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1983 Form

Instructions for Filing Complaint by Prisoners under the Civil Rights Act, 42 U.S.C. § 1983 and the Jurisdictional Statue 28 U.S.C. § 1343(3)

This packet includes four copies of a complaint form and two copies of a forma pauperis petition. To start an action you must file an original and one copy of your complaint for each defendant you name and one copy for the court. For example, if you name two defendants you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. *All copies of the complaint must be identical to the original.*

The clerk will not file your complaint unless it conforms to these instructions and to these forms.

Your complaint must be legibly handwritten or typewritten. The plaintiff or plaintiffs must sign and swear to the complaint. If you need additional space to answer a question, you may use the reverse side of the form or an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, it is neces-

sary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

In order for this complaint to be filed, it must be accompanied by the filing fee of $15. In addition, the United States Marshal will require you to pay the cost of serving the complaint on each of the defendants.

If you are unable to pay the filing fee and service costs for this action, you may petition the court to preceed in forma pauperis. Two blank petitions for this purpose are included in this packet. One copy should be filed with your complaint; the other copy is for your records. After filling in the petition, you must have it notarized by a notary public or other officer authorized to administer an oath.

You will note that you are required to give FACTS. You need not make legal arguments or give citations to cases or statutes.

When these forms are completed, mail the original and the copies to the Clerk of the United States District Court for the Eastern District of Virginia.

1983 Form

FORM TO BE USED BY PRISONERS IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983 AND 28 U.S.C. § 1343(3)

In the United States District Court For Eastern District of Virginia

JOHN FRANKLIN PROSISE
[Enter above the full name of the plaintiff or plaintiffs in this action.]

v.

(1) LT. GILBERT A. HARING
(2) DET. HENRY W. ALLEN
(3) DET. J. R. BADEY
(4) OFFICER ALVIN BEUCHART
(5) OFFICER THOMAS TRUMBLE
(6) OFFICER GARBER
[Enter above the full name of the defendant or defendants in this action.]

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes [ ] No [X]

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the addi-

tional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

   Plaintiffs: NONE

   Defendants: NONE

2. Court [if federal court, name the district; if state court, name the county]: NONE

3. Docket number:

4. Name of judge to whom case was assigned:

5. Disposition [for example: Was the case dismissed? Was it appealed? Is it still pending?]:

6. Approximate date of filing lawsuit:

7. Approximate date of disposition:

II. Place of Present Confinement: ARLINGTON DETENTION CNT.
RM #500
1400 N. COURTHOUSE RD. ARL., VA. 22201

III. Parties

[In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.]

A. Name of plaintiff JOHN F. PROSISE RM #500

Address 1400 N. COURTHOUSE RD. ARL., VA. 22201

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.]

B. Defendant GILBERT A. HARING is employed as A LIEUTENANT at ARL. CO. POLICE DEPT. ARL., VA.

C. Additional Defendants: HENRY W. ALLEN - DETECTIVE - ARL. CO. POLICE DEPT. ARL., VA. J. R. BADEY - DETECTIVE - ARL. CO. POLICE DEPT. ARL., VA. ALVIN BEUCHART - OFFICER - ARL. CO. POLICE DEPT. ARL., VA. THOMAS TRUMBLE - OFFICER - ARL. CO. POLICE DEPT. ARL., VA. ? GARBER - OFFICER - ARL. CO. POLICE DEPT. ARL., VA.

IV. Statement of Claim

State here as briefly as possible the FACTS of your case. Describe how each defendant is

involved. Include also the names of other persons involved, dates, and places. You need not make any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet if necessary.)

On Sept. 7, 1977, at approxamently 8 to 9 PM., I went to my apartment with my fiance, Kathy I. Denny (now my wife) My apt. was located at 224 N. Glebe Rd. Arl., Va. (apt. #4) - We had gotten into an argument, and she got one of my pistols and was threatening me with it. I had gotten my other pistol, for I was scared she would shoot me. Then she got a granny fork from the kitchen, and stabbed me in the left forearm with it. I then called the Arl. Co. Police Dept. I was hoping after I called the police, she would get scared and put down the pistol. She didn't. The police then showed up outside; looking around for someone stabbed. She then yelled out the window that I had a gun and was trying to shoot her. I yelled out that it was her who was trying to shoot me. The police asked if they came up, would I open the door. I said yes. My fiance was then looking out the window, and I grabbed for

her gun. She struggeled for a few seconds trying to keep a hold of the pistol. In the process, both guns, simultaneously went off. One bullit went straight into the floor, one into the ceiling. The police then tried to kick in the door. I yelled that I would open it, don't kick it in. I then opened the door, with both pistols in my left hand, arm stretched out in the opposite direction from the door. There were 3 police officers standing there with pistols pointed at me. Officer Trumble then pushed his way into my apt. and jabbed me with the barrel of his pistol in my right side, telling me to drop the guns. I told him I would, but quit jabbing me with his pistol. I also told him it was my apt., my guns legally registered to me. My left arm was still pointed in the opposite direction from the police. Trumble then jabbed me real hard with his pistol, and grabbed my left arm, making the pistols fall. He threw me towards a couch, at the same time Officer Beuchart hit me with his pistol butt in the head. They handcuffed me and started to take me outside. I told them I didn't want to go. Then said your under arrest, I said okay, but it was against my will. After outside, I asked what I was under arrest for. They said, "we'll think of some-

thing by the time we get to the station". No rights were read that I can remember. I went to the station and demanded to be taken to the hospital. They took me.

After getting out on bond and going home, I found a search warrant there that gave false information. Also, I found out from the search warrant that I had been set up. There was some chemicals in the closet, in boxes. On the search warrant it said they were in the living room. Also, later on, I found out the factory seals had been broken on some of the bottles of chemicals, and some of the chemicals in them disposed of to make them look used. Detectives Allen and Badey, executed the search warrant and confiscated the chemicals.

Charges against Police

(1) Police Brutality - Beuchart, Trumble

(A) Beuchart hit me with pistol butt in head.

(B) Trumble hitting (jabbing) me with pistol and threw me down.

(2) Excessive Force - Beuchart, Trumble, Haring.

(A) Beuchart hit me with pistol. Also had it drawn.

(B) Trumble jabbing me with pistol, threw me down. Also had pistol drawn.

(C) Haring had pistol drawn.

(3) Felonius Assault - Beuchart.

(A) Beuchart hit me hard enough with pistol butt to fracture my cheek bone.

(4) Aiding and Abeting - Beuchart, Trumble, Haring.

(A) All three aided and abeted each other on the first 3 charges.

(5) Abduction - Beuchart, Trumble, Haring.

(A) Each one aided in the abduction, for they had no warrant or probable cause for arrest. I told them that I did not want to be taken from my apt. They said, "lets go, your under arrest". I said okay, but its against my will. Mentally, not physically. I knew if I did not go, they would beat me up more. I was afraid for my life for the reason of them allready beating me up.

(6) Forceable Entry - Beuchart, Trumble, Haring.

(A) Upon opening my door to talk to police, they pushed their way into my apt. against my will.

(7) Trespassing - Beuchart, Trumble, Haring.

(A) Upon opening my door to talk to police, they pushed their way into my apt. against my will.

(8) Illegal Arrest - Beuchart, Trumble, Haring.

(A) No probable cause for arrest, or a warrant for arrest.

(9) Failure to advise of rights - Beuchart, Trumble, Haring.

(A) Failed to read rights at time of arrest.

(10) Illegal Search and Seizure - Beuchart, Allen, Badey.

(A) Beuchart took what he thought to be a suspected drug, out of a shirt in the bedroom closet without a warrant.

(B) Allen and Badey illegally seized chemicals. They were not written down on the search warrant. Also, searched apt. and moved chemicals so they would be in plain sight, before getting the search warrant.

(11) Conspiracy - Beuchart, Trumble, Haring, Allen, Badey, Garber.

(A) All six conspired to move chemicals from boxes in closet, to the living room in plain sight.

(B) All six conspired to keep silent, the truth in my case.

(12) Falsifying Police Reports and Affadavits - Allen

(A) Allen falsified and swore to an affadavit to gain a legal search warrant.

(13) Altering Alleged Scene of a Crime.-Trumble, Garber, Allen, Badey.

(A) All four moved chemicals from closet to the living room, altering an alleged scene of a crime.

(14) Altering Evidence Seized - Allen, Badey.

(A) Both of them broke the factory seals on some of the bottles of chemicals. Then disposing with some of the chemicals from the bottles to make them look used.

(15) Perjury to gain a conviction - Allen.

(A) On April 27th, 1978, Allen committed perjury in the Circut Court of Arlington County, State of Virginia. He committed perjury to gain a conviction on my case.

V. Relief

State briefly exactly what you want the court to do for you.

On charges numbers one through four (1 to 4).

(A) I could of been killed when struck by the pistol.

(B) The pistol being jabbed in my side could of gone off.

(C) They violated my constitutional rights by excessive force and brutality.

For all of the above, I would like to recieve $2,275,000.00 for both compensatory and punitive damages.

On charges numbers five through fifeteen (5 to 15).

(A) For the ruining of the remainder of my life with a felony conviction.

(B) For the worry and mental anguish my family, wife and I went through, am now going through and will go through till the remainder of my 25 year sentence.

For all of the above, I would like to recieve $2,725,000.00 for both compensatory and punitive damages.

Signed this 23 day of January, 1979.

/s/ John F. Prosise

[Signature of plaintiff or plaintiffs]

VERIFICATION

State of Virginia)
County of Arlington)

JOHN F. PROSISE, being first duly sworn, under oath, says: that he is the plaintiff in this action and knows the content of the above complaint; that it is true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

/s/ John F. Prosise

[Signature of affiant-plaintiff]

Subscribed and sworn to before
me this 23 day of January,
1979.

/s/

[Notary Public or other
person authorized by law
to administer an oath]

My Commission Expires 10-30-79

U.S. District Court
Eastern District of Virginia
[Insert appropriate court]

JOHN F. PROSISE
(Petitioner)

v.

GILBERT HARING - HENRY ALLEN - J. R. BADEY - ALVIN BEUCHART - GARBER (Respondent(s)) THOMAS TRUMBLE

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, John F. Prosise, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed?

   Yes ___ No X

   a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

April, 1978 $800.00

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes X No ____

b. Rent payments, interest or dividends? Yes ____ No ____

c. Pensions, annuities or life insurance payments? Yes ____ No ____

d. Gifts or inheritances? Yes ____ No ____

e. Any other sources? Yes ____ No X

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months. (A) Roofer - $1,500.00 (appromently)

3. Do you own any cash, or do you have money in a checking or savings account? Yes X No ____ (Include any funds in prison accounts)

If the answer is yes, state the total value of the items owned.

$14.00 canteen account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes X No ___

   If the answer is yes, describe the property and state its approximate value. 1958 Harley Davidson Motorcycle - $00.00

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. None

   I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

/s/ John F. Prosise
(Petitioner's signature)

State of Virginia.
County (City) of Arlington.

John F. Prosise, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

/s/ John F. Prosise
Signature of Plaintiff (Required as to each plaintiff)

Subscribed and sworn to before me this 23 day of January, 1979.

/s/
Notary Public or other person authorized to administer an oath

My Commission Expires
10-30-79

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 79-105-AM

JOHN FRANKLIN PROSISE,

Plaintiff,

v.

LT. GILBERT A. HARING, et al.,

Defendants.

O R D E R

Let the complaint of John Franklin Prosise be filed *in forma pauperis*.

Plaintiff has filed a complaint charging defendants with: (1) use of excessive force during his arrest; (2) forcible entry and trespass; (4) illegal arrest; (5) failure to advise of *Miranda*. rights; (6) illegal search and seizure because of a defective search warrant; and (7) perjury.

It is the opinion of this Court that plaintiff's complaint states causes of action insofar as it alleges use of excessive force and assault and an illegal search and seizure. From plaintiff's account of the facts it does not appear that the defendants acted outside their duty in entering

plaintiff's apartment or arresting him in the situation of a potentially dangerous domestic quarrel. Defendants' alleged failure to advise plaintiff of his rights does not appear significant in that plaintiff does not allege that he made any incriminating statements. Accordingly, defendants are hereby

ORDERED to respond to plaintiff's allegations of excessive force and illegal search and seizure within twenty (20) days. Plaintiff's other claims are hereby conditionally dismissed. Dismissal becomes final within twenty (20) days unless plaintiff can show how those actions violated his constitutional rights.

The Clerk is directed to send a copy of this Order to the plaintiff and to serve a copy of this Order and the complaint upon the defendants and the County Attorney for Arlington County, Virginia.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
February 5th, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 79-105-AM

JOHN FRANKLIN PROSISE,

Plaintiff,

v.

LT. GILBERT A. HARING, et al.,

Defendants.

MOTIONS OF THE DEFENDANTS TO DISMISS AND FOR SUMMARY JUDGMENT

The defendants, Haring, Trumble, Garber, Beuchart, Allen, and Badey, by counsel, move this Court as follows:

1. To dismiss, pursuant to Rule 12(b)(6) for failure to state a claim, or alternatively to grant summary judgment, pursuant to Rule 56, as to the claim of excessive force during the arrest of plaintiff on September 7, 1977.

2. To grant summary judgment, pursuant to Rule 56, as to the claim of an illegal search and seizure (because of a defective search warrant) on the specific grounds:

a. The claim is barred under the doctrine of collateral estoppel as a result of the

plaintiff's plea of guilty to a criminal charge wherein the issue was necessarily adjudicated and waived;

b. There are no material facts genuinely in issue and the claim is without merit as a matter of law;

c. The defendants cannot be held liable for any damages as a result of search incident to a search warrant since reliance upon the warrant is *per se* reasonable and in good faith.

3. To grant the defendants their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 upon dismissal of the action because the action of the plaintiff is brought in bad faith, is vexatious and frivolous.

LT. GILBERT A. HARING
DET. HENRY W. ALLEN
DET. J. R. BADEY
OFF. ALVIN BEUCHART
OFF. THOMAS TRUMBLE
OFF. STANLEY GARBER

By Counsel

/s/

Jerry K. Emrich
Arlington County Attorney

/s/

David R. Lasso
Assistant County Attorney
1400 N. Courthouse Road, #106
Arlington, Virginia 22201
(703) 558-2705
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motions of the Defendants to Dismiss and For Summary Judgment was mailed, postage prepaid, to John Franklin Prosise, the Plaintiff, c/o Arlington County Detention Center, 1400 N. Courthouse Road, Room 500, Arlington, Virginia 22201, on this 26th day of February, 1979.

/s/ David R. Lasso

AFFIDAVIT FOR SEARCH WARRANT

Commonwealth of Virginia:

County of Arlington, to wit:

Before Me, _____, a Special Magistrate of said County or Judge of the County Court for the County aforesaid, as shown on signature line, this day, appeared Det Henry W. Allen #463 ACPD and made affidavit as follows:

(1) Substantially the offense in relation to which search is to be made.

Phencyclidine as listed in Section 54-524.84:6 Schedule II, Code of Virginia and possessed in violation of Section 18.2-250(A) Code of Virginia.

(2) The material facts constituting probable cause for issuance of the warrant.

The following information from Police Agent A. P. Beuchert #431 ACPD was received by the affiant: On September 7, 1977, at about 2115 hours Officer Beuchert received a call via police dispatcher that a man was being stabbed at 224 North Glebe Road, Apt #4, Arlington, Virginia. Upon Arrival, Officer Beuchert heard suspected gunshots coming from that location. After knocking a subject came to the door holding two hand guns. Officer Beuchert and Trumble took the weapons from the subject and placed him under

arrest for discharging a firearm. Upon search of the subject a quantity of suspected Phencyclidine was found on his person. A femal subject who was also living at that address told Officer Beuchert that there were more drugs in the apartment and showed him where a plastic bag of suspected Phencyclidine was. This was also confiscated by Officer Beuchert.

At about 2200 hours on September 7, 1977, affiant was called to respond to 224 North Glebe Road, Apt #4, Arlington, Virginia. Upon arrival affiant smelled what he believed to be the odor of ether inside the apartment. Affiant also observed various chemicals which affiant has knowledge of are many times used in the manufacture of Phencyclidine. Affiant then returned to the station while Officers Trumble and Garber held the apartment secured. Affiant performed a preliminary field test on the suspected Phencyclidine and obtained a positive reaction.

Affiant's training and experience includes approximately four years as a Narcotics Enforcement Officer during which time affiant has observed Phencyclidine on at least 100 occasions. Affiant has successfully completed the Drug Enforcement Administration Training School and is also attended several Federal, State and local Narcotics Seminars.

It is the belief of the affiant that Phencyclidine is presently being stored on the below described premises.

(3) What is to be searched for under the warrant?

Phencyclidine as listed in Section 54-524. 84:6 Schedule II, Code of Virginia and possessed in violation of Section 18.2-250(a) Code of Virginia.

(4) The house, place, vehicle, or baggage to be searched.

All of a certain premises known as 224 North Glebe Road, Apt #4, Arlington, Virginia, the same being a red brick two story multi apartment dwelling.

Signature of affiant_____

Subscribed and sworn to before me this___day of_____, 19___ at____(a.m.)(p.m.)

_____
Special Magistrate/Judge

Certified of the Clerk of the Circuit Court of Arlington County.

_____
Special Magistrate/Judge

V I R G I N I A:

IN THE CIRCUIT COURT OF
ARLINGTON COUNTY

C-12,689 and C-12,951

COMMONWEALTH OF VIRGINIA

vs.

JOHN FRANKLIN PROSISE

PLEA AGREEMENT
MEMORANDUM

COME NOW the Commonwealth of Virginia, by her Attorney, the defendant, John Franklin Prosise, and his attorney, Ian M. Rodway, and represent to the Court that a plea agreement has been entered into by the respective parties for the disposition of these cases. The aforesaid agreement consists of the following provisions, which constitute the entire agreement:

1. The defendant agrees to enter a plea of guilty to Indictment C-12,689, wherein he is charged with the manufacturing of a controlled substance, to wit: Phencyclidine, a Schedule II substance.

2. The Commonwealth agrees to enter a *nolle prosequi* in case C-12,951, wherein the defendant is charged with the possession of a

controlled substance, to-wit: Phencyclidine, a Schedule II substance.

3. The defendant acknowledges the following:

a) That no agreement exists with respect to sentencing.

b) That every part of this agreement has been written down and appears herein.

c) That he has discussed this memorandum with his attorney.

d) That this agreement was voluntarily reached, that no officer or employee of the State, County, Commonwealth's Attorney's Office, Counsel for Defendant, or anyone else, has made any promises of leniency to him, outside of this agreement, or threats in exchange for his entering into this agreement.

e) That the judge will be informed of this plea agreement but that the Court is not bound to follow it.

f) That he understands that no promise or agreement which is not disclosed to the Court and contained in this memorandum will be recognized.

4. The defendant understands that upon being found guilty of manufacturing a controlled substance, to-wit: Phencyclidine, a Schedule II substance, he may receive a term of imprisonment of not less than five nor more than forty years and a fine of not more tha twenty-five thousand dollars.

SEEN AND AGREED this 27th day of April, 1978.

/s/

John Franklin Prosise,
Defendant

/s/

Kenneth E. Melson,
Attorney for the
Commonwealth

/s/

Ian M. Rodway,
Counsel for Defendant

PLEA AGREEMENT TRANSCRIPT

April 27, 1978

(Begin Transcript page 6)

Whereupon,

DETECTIVE HENRY ALLEN,

was called as a witness by and on behalf of the Commonwealth of Virginia, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELSON:

Q State your name for the court.

A Henry W. Allen.

Q By whom are you employed?

A Arlington County Police Department. I am an officer working in the Narcotics Division.

Q How long have you been in Narcotics?

A Four and a half years.

Q How long have you been a police officer?

A Six years.

Q Directing your attention to September 7, 1977, did you have occasion around 10:00

o'clock to respond to 224 North Glebe Road, Apartment No. 4, in Arlington?

A Yes, I did.

Q Tell us why you responded there and what you found.

A I received a radio call while in the vicinity, to respond to 224 North Glebe Road, Apartment No. 4, and I (Begin Transcript page 7) responded; and there were two uniformed police officers there, and an individual named John Prosise, who had been arrested on a charge which included the possession of a controlled substance.

Q What did that substance turn out to be?

A Phencyclidine.

Q Was that taken to the laboratory?

A Yes, it was.

Q Did you receive a certificate of analysis?

A Yes, sir.

Q May I have this marked as Commonwealth's Exhibit No. 1?

(The above-mentioned certificate was marked as Commonwealth's Exhibit No. 1 for identification.)

BY MR. MELSON:

Q Is this the certificate which you received?

A Yes, sir, it is.

Q And what else occurred while you were at that address of 224 North Glebe Road?

A Upon my arrival, I smelled an odor of ether, and upon looking around, saw some chemicals about the apartment. I observed a quantity of a substance of what I believed to be (Begin Transcript page 8) PCP upon the living room table. At the time, I asked the officer to hold the place secured.

Q Do you know who the occupant of that apartment was?

A John Prosise, and Katherine Eileen Denni.

Q Did you find a lease to the apartment with his name on it?

A Yes, I did.

Q Did there come a time you were issued a search warrant for the apartment of 224 North Glebe Road?

A Yes, I did.

Q What occurred after the search warrant was issued?

A My partner, Detective Petti, and I returned to the apartment at 224 North Glebe Road and executed the search warrant on the premises at approximately 2400 hours on the 7th.

Q What was seized as a result of that search?

A The property Detective Petti and I seized included two jars of cyclohexanone, two jars of cyanide, scales, a four gallon can of Coleman's fuel, two jars of lye, assorted drug paraphernalia, a jar of iodine, a jar of hydrochloric acid, four plastic baggies of suspected PCP, four 8 ounce cans of parsley, two plastic buckets with traces of suspected PCP.

Q (Begin Transcript page 9) Did you mention anything about parsley being found?

A Yes.

Q Were any papers seized during the search?

A Assorted papers, several receipts from Norris Strong Chemical Company in Prince George's County, and customer receipts from supply places or parsley places.

Q Do you recall what was included in one of the two devices you seized?

A Yes, sir, among the personal papers I seized were two devices. One had what I believe to be a formula to make PCP, and it was later confirmed by Dr. Hepner.

Q What were the customer receipts for?

A The customer receipts were for assorted chemicals used in the manufacture of phencyclidine. I transported those to the Northern Virginia Lab, to a Mr. Davis for handwriting analysis.

Q Did they have the defendant's handwriting on it?

A It had John F. Prosise on it, and Mr. Davis confirmed that they were written by Mr. Prosise.

Q Let me show you the two laboratory certificates, these are exhibits 2 and 3. Can you identify what these exhibits are?

((Begin Transcript page 10) The above-mentioned documents were marked Commonwealth's Exhibits No. 2 and 3 for identification.)

A I received these from Mr. Davis in reference to the handwriting samples of the questioned document, and the known handwriting.

Q Did he conclude that the handwriting was that of Mr. Prosise?

A Yes, it does.

Q And the signature on the customer receipt, is that of Mr. Prosise?

A Yes, it is.

Q Did you take the chemicals to the laboratory?

A Yes, I did, I transported them to the Northern Virginia Forensic Laboratory on the 8th of September, the following day.

Q Did you receive, as a result of the analysis, a certificate of analysis?

A I turned the chemicals to Pauline Wagner, and she returned them back to me with an analysis report.

((Begin Transcript page 11) The above-mentioned document was marked Commonwealth's Exhibit No. 5 for identification.)

BY MR. MELSON:

Q Let me show you first, Dectective Allen, the report which is marked as Commonwealth's Exhibit No. 5, and ask you what the chemist's second finding was.

A There were two items, one envelope containing a green material; and an item containing a white crystal type material. The chemist report states that item two was what is known as PCC, the intermediate stage of PCP.

Q How many stages are there in the manufacture of PCP?

A Two stages. The end result of the first stage, which is the intermediate, is PCC.

Q Is that what is referred to on the laboratory report?

A Yes, sir.

Q Let me show you Exhibit No. 4. Can you identify this laboratory certificate?

(The above-mentioned document was marked Commonwealth's Exhibit No. 4 for identification.)

A (Begin Transcript page 12) Yes, sir, I can.

Q From whom did you receive that?

A I received that from Pauline Wagner at the Northern Virginia Forensic Laboratory in reference to the chemicals I took out there for analysis.

Q Did she conduct an analysis of the two buckets you seized from the home?

A The two buckets were found to contain PCP.

Q Is that the complete product?

A Yes, sir.

Q Did she confirm the presence of other chemicals that were seized?

A Yes, sir.

Q Were there any other chemicals needed to manufacture PCP that were not seized from the defendant's home?

A Yes, sir, sodium metabisulfite, piperidine, bromobenzene.

Q Are any of the chemicals necessary in the first stage of the operation?

A In the first stage you must have piperidine and sodium metabisulfite may be used.

Q The completed product of the first stage was found?

A Yes, it was.

Q (Begin Transcript page 13) Do you know whether, even though the defendant had completed the first stage, he had ordered an addi-

tional quantity of sodium metabisulfite and piperidine?

A Yes, sir, I have a cancelled receipt from Norris Strong, which states an order was called in and was made for the sodium, the bromobenzene and the piperidine on September 6, 1977.

Q These would not have been needed to complete a batch?

A No.

Q What is bromobenzene used for?

A It is used in the second stage.

Q With the Grignard Reagent?

A Yes, sir, it is.

Q That was also ordered by the defendant?

A Yes, sir.

Q In that same order?

A Yes, sir.

Q When was the order made?

A September 6, 1977, and it was cancelled December 6.

Q You referred also to one of the items as being parsley?

A Yes, sir.

Q (Begin Transcript page 14) Did you find any tickets referring to an order for parsley?

A I found a copy of an order from Atlantic issued for four cases, each case containing six 8 ounce cans of parsley.

Q How many pounds is that?

A Twelve pounds.

Q How many?

A Twenty-four 8 ounce cans, 12 pounds.

Q You didn't find 10 pounds there?

A I did not.

Q Did you find any empty cases?

A I did not.

Q Do you know how much of the intermediate stage was first found by weight?

A 82.5 grams in the intermediate stage.

Q How much PCP could be made from that?

A In discussing it with Dr. Hepner at the Northern Virginia Laboratory, using the formula, he estimated it would produce 2.2 pounds, roughly.

Q Is PCP then spread over parsley?

A Yes, sir.

Q When you are saying 2.2 pounds of PCP, or 2.2 pounds of killer weed, why is the parsley used?

A (Begin Transcript page 13) In the final product it is spread over the parsley. The total amount that was seized was calculated that it would have produced about 44 grams of a finished product of PCP.

THE COURT: That is not 44 grams treated with parsley.

THE WITNESS: No, sir.

THE COURT: Do you know the amount of PCP, how much would be needed to treat it with parsley?

THE WITNESS: Dr. Hepner said 44 grams could be treated with two pounds of parsley.

BY MR. MELSON:

Q How much parsley did you find?

A Twelve pounds.

Q What is the estimated, from your experience, the market value on the street of parsley treated PCP?

A It would go from $1500 to $1700 a pound.

Q Did you mention that a 3-A triple beam balance scale was found?

A Yes, sir.

Q And is the person you are referring to John Franklin Prosise —

MR. RODWAY: (Interposing) We stipulate it is him.

MR. MELSON: (Begin Transcript page 16) We have no further questions.

MR. RODWAY: We have no questions.

MR. MELSON: There supposedly has been filed with the court copies of the originals, and if we can substitute them, I would like permission to retrieve the others.

THE COURT: I don't see the file here.

MR. MELSON: I think they are in the clerk's office in an accordian file. So, I introduce these as the copies here, and the others are the originals.

THE COURT: Let me have these. If he can have your permission to receive these —

MR. RODWAY: (Interposing) Yes, sir.

THE COURT: All right, they are received in evidence, and the copies that are in the clerk's office may be released to the Commonwealth Attorney.

(The documents marked Commonwealth's Exhibits 1 to 5 were received in evidence.)

Does the Commonwealth have any further evidence?

MR. MELSON: No, sir.

THE COURT: Does the defense wish to present any evidence?

MR. RODWAY: No, sir.

THE COURT: (Begin Transcript page 17) The court finds the plea of guilty to be voluntarily and intelligently tendered and finds there is a sufficient factual basis; and upon the evidence heard this morning, the court finds the defendant guilty of the manufacture of phencyclidine as charged in the indictment C-12689.

Do you request a presentence report?

MR. RODWAY: Yes, sir.

THE COURT: No sentence is imposed at this time, and the case is referred to the Probation Parole Office for the preparation of a presentence report.

MR. RODWAY: He was born in Arlington and he has lived here on and off. He was in the military, and in essence he has lived a long

residence in this area, though I can't say everyone of his family was born here. His family moved away and then came back. His mother came back. He has not been any trouble.

THE COURT: June 9?

MR. MELSON: That is fine with the Commonwealth.

MR. RODWAY: Yes, sir.

THE COURT: This case is continued to June 9 for sentencing, subject to a presentence report.

Do you have a motion with respect to 12951?

C-12689

COMMONWEALTH OF VIRGINIA

vs.

JOHN FRANKLIN PROSISE

THE 15th day of June, 1978 came the Commonwealth of Virginia, by its Attorney, the Defendant in custody of Sheriff and the Defendant's retained Attorney, Ian Rodway.

WHEREUPON the Defendant acting pro-se, moved the Court to withdraw his plea of guilty heretofore entered in this case: which said motion the Court denied.

IT APPEARING to the Court that the Defendant was previously found "Guilty" of "Manufacturing of a controlled substance, to-wit: Phencyclidine" this case was continued to this date for the imposition of sentence.

WHEREUPON the Defendant was asked if he had read and understood the report and further if he had discussed the report with his counsel, to all of which the Defendant replied in the affirmative.

THEREUPON the Attorney for the Defendant was asked if he desired to have the Probation Officer or any other witness sworn to testify

regarding the matter before the Court, to which the Attorney for the Defendant replied in the negative.

THEREUPON the Court ordered that the report of the Probation Officer be filed as a part of the record in this case after certain discrepancies were noted therein, as are more specifically set forth in the stenographic record of this case.

AND IT BEING DEMANDED of the accused if he desired to make a statement or to advance any reason why judgment should not be pronounced against him according to law, both he and his counsel made statements to the Court.

THEREUPON the Court, taking into consideration said statement and all of the evidence in the case, the report of the said Probation Officer and argument of counsel, doth ascertain and fix the punishment of the accused to be confinement in the Penitentiary of this Commonwealth for a period of twenty-five (25) years and a fine of $1,000.00 and payment of the costs of these proceedings.

IT IS ACCORDINGLY the Judgment of this Court that the said John Franklin Prosise be and he is hereby sentenced to confinement in the Penitentiary of this Commonwealth for the term

of twenty-five (25) years and a fine of $1,000.00, the period by the Court ascertained as aforesaid, and that the Commonwealth of Virginia, do recover against the said John Franklin Prosise its costs by it about its prosecution in this behalf expended.

IT IS FURTHER ORDERED by the Court that as soon as possible after the entry of this order, the Defendant be removed and safely conveyed according to law from the Jail of this Court to the Penitentiary of this Commonwealth; therein to be kept, confined and treated in the manner provided by law.

THE COURT ORDERS that the Defendant be allowed credit for the time spent in jail awaiting trial, namely September 8, 1977 (one day) and since April 27, 1978.

THE COURT CERTIFIES that at all times during the trial of this case the accused was personally present.

THE birth date of the Defendant is December 25, 1954.

AND the Defendant is hereby remanded to jail.

ENTERED this 23rd day of June, 1978.

/s/ Charles S. Russell
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 79-105-AM

JOHN FRANKLIN PROSISE,

Plaintiff,

v.

LT. GILBERT A. HARING, et al.,

Defendants.

O R D E R

The Court has received defendants' answer, motion to dismiss or for summary judgment, memorandum in support of that motion and supporting affidavit of facts. These pleadings respond to plaintiff's allegations that defendants used excessive force during plaintiff's arrest and that the search warrant issued to authorize the search of his apartment was defective, thereby making the search and seizure illegal.

With respect to plaintiff's first claim of excessive force, defendants submit the following: that on September 7, 1977, several of the defendants, who were Arlington County police officers, responded to a call for assistance made by the plaintiff; that upon arrival at plaintiff's apartment

the officers saw plaintiff and his fiance, Katherine Denny, at the window and heard them accuse each other of holding a gun; that upon approaching the door of plaintiff's apartment the officers heard Denny shout that "he has a gun;" that after announcing themselves the officers attempted unsuccessfully to open the door; that the officers then heard two gunshots and promptly drew their weapons; that plaintiff opened the door and stood in the doorway holding a revolver and a pistol; that plaintiff was told to drop his weapons but refused to do so; that the officers then seized plaintiff and attempted to disarm him by force; that a brief scuffle ensued during which defendant Trumble struck plaintiff with his fist to force plaintiff to drop his weapons; and that plaintiff was thereafter disarmed, handcuffed and taken into custody.

These sworn representations entitle defendants to summary judgment on claim (1). Plaintiff's possession of two weapons and refusal to drop them upon request by police officers fully justified the reasonable use of force to disarm plaintiff. The fact that plaintiff was six foot four inches tall and was engaged in a heated argument involving weapons further support the reasonable use of force to ensure the officers' safety. Even accepting as true plaintiff's allegation that Of-

ficer Trumble jabbed him hard with his pistol and threw plaintiff toward a couch, the Court views these acts as reasonable responses to the threat posed by an armed and uncooperative individual. Although plaintiff alleges that Officer Beuchert struck him in the head with a pistol butt with enough force to fracture plaintiff's cheekbone, defendants' affidavit does not indicate that such a blow was struck. The Court concludes that defendants deny that Officer Beuchert delivered such a blow since defendants' sworn affidavit, purporting to recite the events in question, omits any reference to a pistol-whipping. The Court relies on this sworn affidavit in arriving at the conclusion that defendants used reasonable force in subduing plaintiff and therefore are entitled to summary judgment. As indicated below, the award of summary judgment is made conditional for the purpose of affording plaintiff an opportunity to submit an affidavit that contradicts defendants' version of the facts in question, particularly the actions of Officer Beuchert with reference to the alleged pistol-whipping.

In his second claim plaintiff attacks the validity of the search warrant obtained by the defendants to authorize the search of plaintiff's apartment. In his complaint plaintiff stated that the search warrant obtained to seize chemicals and devices used to manufacture phencyclidine

(PCP) contained "false information" that was used to "set up" the plaintiff. In an attempt at explanation plaintiff asserted that the search warrant was directed at chemicals in the living room whereas in reality they were located in the closet; he further contended that the officers who executed the warrant (defendants Allen and Badey) emptied out some of the contents of the chemical bottles in order to create the appearance of use by the plaintiff. He further charges officers Allen and Badey with seizing chemicals that were not authorized to be seized in the warrant and with moving chemicals around so that they would appear in plain view. Finally, plaintiff maintains that Officer Beuchert exceeded the scope of the search warrant by seizing drugs out of a shirt located in the bathroom.

Defendants contend that plaintiff is collaterally estopped from contesting the validity of the search warrant because he pled guilty to a charge that was predicated on the fruits of the search. They also present an alternative argument suggesting that the search warrant was valid and supported by an appropriate affidavit (see defendants' exhibit A) and that the officers did not exceed the scope of the warrant.

The Court is also convinced of the validity of the warrant and subsequent search. Certainly

detective Allen's affidavit, based upon his own observations and the statements of Katherine Denny, were sufficient to make the requisite showing of probable cause. *Berger v. New York*, 388 U.S. 41 (1967); *United States v. Ventresca*, 380 U.S. 102 (1965). Moreover the scope of the search did not exceed the items set forth in the search warrant.[1] *Andresen v. Maryland*, 427 U.S. 463 (1976). But the disposition of plaintiff's fourth amendment claim should not, at this stage, be based upon its merits where, as here, defendants assert that collateral estoppel bars any consideration of the merits in the first instance. In support of this argument defendants refer the Court to the Fourth Circuit's recent decisions in *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977), and *Wiggins v. Murphy*, 576 F.2d 572 (4th Cir. 1978). Those cases, however, do not stand for the proposition suggested by the defendants. In *Rimmer* the court held that the doctrine

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[1]The Court also notes that the search of plaintiff's apartment can in part be upheld as a consent search because Ms. Denny, who also resided at the apartment, led officers to a hall closet containing PCP and apparatus used in its manufacture. Since Ms. Denny possessed "common authority" over the premises, the search can be justified without regard to a warrant. *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Carter*, 569 F.2d 801 (4th Cir. 1977).

of collateral estoppel foreclosed assertion of a state prisoner's claim that identification testimony was unconstitutionally admitted into evidence because the issue was precluded by the standing state conviction. The *Rimmer* court explicity refrained from deciding the availability of a § 1983 cause of action where there is no right of access to a federal habeas forum. The court recognized that such a situation could arise with respect to fourth amendment claims because the Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), normally would foreclose state prisoners from litigating such claims in a federal habeas forum.

The *Rimmer* decision suggests that collateral estoppel applies only to those issues which can be presented a federal habeas forum. *Von Lusch v. C & P Tel. Co.*, 457 F.Supp. 814 (D. Md. 1978). That suggestion is implicit in the *Rimmer* court's observation that "[s]ince it was the general intention of the Civil Rights Act to provide access to a federal forum for the adjudication of federal constitutional rights, the Civil Rights Act itself may present a bar to foreclosure of the issue in those cases [in which federal review is otherwise unavailable]." 567 F.2d at 276. Since a fourth amendment claim normally is not subject to

federal habeas review,[2] plaintiff in this action would be unable to litigate his claim of illegal search and seizure unless he is permitted to do so under § 1983.[3]

This case is complicated, however, by the fact that plaintiff's conviction was secured through a plea of guilty. This additional factor was not present in *Rimmer*, wherein the § 1983 plaintiff had actually litigated at trial his claim that a witness' identification testimony was inadmissible. *See* 567 F.2d at 275. Thus the plaintiff there was collaterally estopped from raising this claim in a § 1983 action because he "fully litigated the question he now tenders in the course of his criminal trial...." *Id.* at 276. In this case there was no criminal trial and the search and seizure question was not "fully litigated" as it was in *Rimmer*. Regardless of whether this distinction removes this case from the purview of *Rimmer*, however, the Court believes that plaintiff's plea of guilty estops him from asserting a fourth amendment claim in a § 1983 suit. The plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful. *See*

2*See Stone v. Powell, supra.*

3*See Christine M. Fore, et al. v. W. G. Newell*, Civil Action No. 78-417-AM, pp. 8-9 n. 3 (E.D. Va. October 10, 1978).

Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974); *Meadows v. Evans*, 550 F.2d 345, 351-53 (5th Cir. 1977) (per curiam) (Tjoflat, Jr., concurring in part and dissenting in part). While the plea did not include an admission of the elements of the crime such as in *Brazzell*, it did admit the facts necessary to subject the plaintiff to criminal liability. Most important, the Supreme Court has held that deprivation of constitutional rights occurring prior to a guilty plea may not be asserted in subsequent proceedings. *Tollett v. Henderson*, 411 U.S. 258 (1973); *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

In *Tollett* the Court held that a state prisoner who tenders a guilty plea may not thereafter assert on federal habeas corpus constitutional claims that relate to events that occurred prior to entry of the plea.[4] The question is

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[4]The pervasiveness of the holding in *Tollett* was somewhat limited by two subsequent decisions. In *Blackledge v. Perry*, 417 U.S. 21 (1974), the Court held that a guilty plea did not bar a prisoner's complaint that his conviction violated due process concerning "the right not to be haled into court at all...." *Id.* at 30. One year later the Court decided that a guilty plea did not bar a prisoner's double jeopardy claim. *Menna v. New*

(footnote continued)

whether this rule of preclusion should apply when a fourth amendment claim, which could not in most instances be raised in a federal habeas petition, is presented in a § 1983 suit. Two values conflict here; the interest, discussed above, in affording this plaintiff access to the § 1983 forum and the "waiver" effect attendant to a guilty plea adverted to by the *Tollett* Court. Certainly a claim of illegal search and seizure is the kind of non-jurisdictional defect that a defendant may not thereafter assert in a habeas corpus petition under *Tollett*. As the Court later explained in *Menna v. New York*, 423 U.S. 61, 62-63 n. 2 (1975) (per curiam), a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established."

Recent decisions of the Supreme Court establish beyond doubt that search and seizure claims are unrelated to the existence of "factual guilt." *Stone v. Powell, supra* at 489-90; *United*

(footnote continues)

York, 423 U.S. 61 (1975) (per curiam). *See also United States v. Bluso*, 519 F.2d 473 (4th Cir. 1975); *United States v. Sams*, 521 F.2d 421 (3d Cir. 1975); *Williams v. State of Md.*, 445 F.Supp. 1216 (D. Md. 1978).

States v. Janis, 428 U.S. 433 (1976); *Kaufman v. United States*, 394 U.S. 217 (1969). Notwithstanding the unavailability of the federal habeas forum under *Stone*, therefore, plaintiff's fourth amendment claim would not be cognizable in any event because his plea of guilty foreclosed access to habeas corpus under *Tollett*. It follows that the considerations referred to above that may make appropriate the availability of the § 1983 cause of action because of the preclusive effect of *Stone* do not pertain to cases in which there is the added element of a guilty plea. Plaintiff's guilty plea cut off his access to a federal habeas forum to litigate a fourth amendment claim and at the same time should have a similar effect upon a § 1983 suit. If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*. The Court thus concludes that plaintiff's fourth amendment claim cannot be maintained in this § 1983 action under the reasoning undergirding the *Tollett* decision.

For the foregoing reasons, it is hereby

ORDERED that conditional summary judgment be entered in favor of the defendants on plaintiff's claim of excessive force during arrest; summary judgment becomes final in fifteen (15) days unless plaintiff can show that the defendants' use of force was excessive. Summary judgment will be entered in favor of the defendants on plaintiff's claim of unlawful search and seizure and that claim stands dismissed.

Finally, plaintiff's numerous submissions included an affidavit from his wife, Katherine I. Prosise, that sets forth a claim that she was touched in an offensive manner by Officer Badey. This claim is unrelated to the alleged violation of her husband's civil rights, which is the subject of the suit against the defendants, and therefore must be dismissed without prejudice. Should Mrs. Prosise desire to file suit on her own behalf based on her claim of assault, she is free to do so in a separate action.

The Clerk is directed to send copies of this Order to the plaintiff and to the County Attorney for Arlington County, Virginia.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
April 17, 1979

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer;
and GARBER, Officer,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria.
Albert V. Bryan, Jr., District Judge.

Argued June 2, 1981 Decided December 30, 1981

Before WINTER, BUTZNER,
and PHILLIPS, Circuit Judges.

Norman A. Townsend (Sebastian K. D. Graber, Graber, Stetler and Townsend on brief) for Appellant; David R. Lasso, Assistant County Attorney (Jerry K. Emrich, Arlington County Attorney on brief) for Appellees.

PHILLIPS, Circuit Judge:

Prosise appeals the district court's grant of summary judgment dismissing his claims under 42 U.S.C. § 1983 that Arlington County, Virginia police officers violated his constitutional rights by using excessive force in arresting him and by conducting a search and seizure in violation of the fourth and fourteenth amendments. The district court held that the officers' use of force was reasonable and not excessive under the circumstances and that the search and seizure claim was precluded by Prosise's guilty plea in the related state court criminal prosecution. We affirm the district court's dismissal of the excessive force claim, but we reverse and remand the search and seizure claim for further proceedings because we do not think the state conviction based on a guilty plea should preclude litigation of that claim.

I

In September 1977, the defendants, County Police Officers Haring, Trumble, Beuchert and Garber, answered a radio call about a domestic disturbance. Arriving at the scene, the officers saw Prosise and a woman, Katherine Denny, at the window of the apartment. Both Prosise and Denny yelled to the officers that the other had a gun, and Prosise held his arm out of the window showing a wound where Denny had stabbed him.

Prosise called to the officers that he would let them in if they came up.

The officers went up the stairwell and stood outside the door on a landing. They announced themselves and attempted unsuccessfully to open the door. After hearing two gunshots, they drew their guns and tried to kick the door in. At that moment, Prosise - who is six feet four inches tall - opened the door and greeted the officers with two handguns in his left hand. The officers ordered him to back away and drop his weapons. He refused to do so, even when one officer pointed a gun at his chest and repeated the order. Fearing that he might use his weapon, the officers seized him and sought to disarm him by force.

A scuffle ensued, during which the officers subdued and disarmed Prosise. He was handcuffed and taken into custody and was later treated at a local hospital for abrasions. Prosise claims that the officers struck him in the cheek with a pistol during the scuffle, while Trumble remembers only that he struck him with his fist in order to disarm him.

After Prosise was taken away, Denny told the officers that Prosise was manufacturing drugs and that he kept them in a closet. She led them to a closet and showed them a baggie she said

contained "PCP" (phencyclidine or "angel dust") and the substances and devices which she said Prosise used in making PCP.

The officers did not seize any of the articles but called Narcotics Detective Allen to the scene. This practice is standard when drugs of this nature are involved because the chemicals are often volatile and can be dangerous. Detective Allen noticed a smell of ether, saw the chemicals in the closet and concluded that these chemicals were probably being used to manufacture PCP. Allen left the two remaining officers to secure the area and went to the magistrate for a search warrant. Allen returned with a search warrant, and the officers searched the apartment, seizing the chemicals and drug paraphernalia.

Prosise was later charged in a state prosecution with a count of manufacturing phencyclidine and a count of possession of phencyclidine. He executed a plea agreement wherein he was to plead guilty to the count of manufacturing in return for a *nolle prosequi* of the count of possession. The Arlington Circuit Court accepted his guilty plea. At the hearing, Detective Allen testified about the search of Prosise's apartment, explaining that a chemist had identified the chemicals seized as being PCP in various stages of manufacture.

At sentencing some weeks later, Prosise attempted to withdraw his guilty plea. The court denied Prosise's motion to withdraw the plea and imposed a sentence of fine and imprisonment. The Virginia Supreme Court denied his petition for writ of error challenging the voluntariness of his plea and the refusal of the trial court to permit the withdrawal of the plea. *Prosise v. Commonwealth*, Record No. 78-1479 (July 17, 1979).

Prosise then commenced this action in the United States District Court for the Eastern District of Virginia alleging, under 42 U.S.C. § 1983, a denial of his constitutional rights under color of state law. He claimed, among other things, that the officers had used excessive force during this arrest and had engaged in an illegal search and seizure. The district court dismissed all but these two claims, and the defendants moved for summary judgment as to them.

The district court granted summary judgment for the defendants on the excessive force claim, based on the uncontradicted sworn statements of the officers explaining the circumstances of their use of force, and on the fourth amendment claim, on the basis that recovery was precluded by Prosise's guilty plea. This appeal followed.

Prosise contends here that his verified complaint sufficiently stated a cause of action under § 1983 for the use of excessive force, and that it was uncontradicted by the defendants' affidavits supporting their motion. The defendants did not deny his allegation that he was "pistol-whipped." At the very least, then, he is entitled to a plenary evidentiary hearing. He further contends that, on the authority of *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), this court should enter summary judgment in his favor.

Second, he argues that he is not precluded by his guilty plea from maintaining a § 1983 action against the arresting officers for illegal search and seizure. Under the Supreme Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), holding that the conventional doctrines of collateral estoppel are to be applied to § 1983 claims, he contends that his fourth amendment claim is not precluded because it was not actually litigated in the state criminal action.

II

We consider first Prosise's claim that unconstitutionally excessive force was used in his arrest. Although we agre with Prosise that on the summary judgment record there is a factual dispute as to the exact details of the arrest encounter, we agree with the district court that

even on the facts as Prosise alleges them the force used to subdue him was not under the circumstances constitutionally excessive.

The rule applied in *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), does not help Prosise. The encounter here alleged was, on Prosise's own account, one quite different from that in *King*. Prosise, a very large man, held two handguns and refused to drop them on command. There is no suggestion that the officers applied any force subsequent to disarming and subduing him. This situation is simply unlike that in *King* where force was applied to one safely in custody "maliciously and sadistically for the very purpose of causing harm," *id.* at 73 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)), but is manifestly one where the officers acted in a reasonable, hence good faith, effort to subdue an armed man who was plainly resisting lawful authority and posing a real threat of harm. We therefore agree with the district court that on the facts as stated in Prosise's verified complaint the defendants were entitled to summary judgment on this claim.

III

The district court held that Prosise was absolutely precluded in respect of his fourth amendment claim on two bases: (1) that, though the question of the search and seizure's legality

had not been "fully litigated" in the state criminal action, *cf. Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977) (actual litigation results in preclusion), the "plea of guilty estops him" because it "necessarily implied that the search...was lawful." *Prosise v. Haring, et al.*, C.A. No. 79-105-AM, slip op. at 5, 6 (E.D. Va. April 17, 1979); and (2) that, in any event, under *Tollett v. Henderson*, 411 U.S. 258 (1973), and its progeny, the guilty plea had the effect of waiving the antecedent constitutional objection since that objection was neither related to factual guilt or innocence nor to the right of the defendant not to be tried. *Prosise*, slip op. at 6, 7.

A

On the waiver basis for decision, we think that the specific waiver principle announced in *Tollett* properly applies only to subsequent federal habeas corpus proceedings challenging the criminal conviction. As analyzed in *Tollett*, this principle rests upon the perception that the guilty plea constitutes "a break in the chain of events" in the criminal prosecution, *Tollett*, 411 U.S. at 267, so that any subsequent habeas corpus inquiry is necessarily focused on the constitutional validity of the plea and "not the existence as such of an antecedent constitutional infirmity." *Id.* at 266. This is inapposite to the question whether a § 1983

claim based upon the "antecedent constitutional infirmity" may later be prosecuted free of any preclusive effect. In consequence, we think that whether there should be any preclusive effect is to be determined on the basis of other principles, specifically, of collateral estoppel and the full faith and credit statute, 28 U.S.C. § 1738. To those we now turn.

B

For possible guidance on these questions we withheld decision following original hearing of this appeal and reheard it on supplemental briefs following the Supreme Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), where the general problem of preclusion by collateral estoppel in § 1983 actions was presented. The decision in that case was, however, a narrowly confined one that is not of itself dispositive here. It held only that even though *Stone v. Powell*, 428 U.S. 465 (1976), may have deprived a state prisoner of a federal habeas forum to pursue a fourth amendment claim, the conventional doctrine of collateral estoppel and the full faith and credit command of 28 U.S.C. § 1738 might operate by issue preclusion to deprive him as well of the alternative § 1983 forum for pursuing it. *McCurry*, 449 U.S. at 103-05.

Specifically not decided by the *McCurry* Court was the question "*how* the body of collateral-estoppel doctrine or 28 U.S.C. § 1738 should apply," *id.* at 105 n.25 (emphasis in original), including the question "whether any exceptions or qualifications within the bounds of [the] doctrine might ultimately defeat a collateral-estoppel defense," *id.* at 95 n.7, in a subsequent § 1983 action. But the Court was at special pains to point out that the collateral estoppel doctrine to be applied is the "conventional doctrine" rather than any "new, more stringent" one, and, most specifically, that it is not one which "turns on the single factor of whether the State gave the federal claimant a full and fair opportunity to litigate [the] federal question." *McCurry*, 449 U.S. at 95 n.7.[1]

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[1]This last point, that collateral estoppel in § 1983 actions cannot be based solely upon the fact that a full and fair opportunity to litigate the federal issue was provided in state court, was made in specific response to the dissent's suggestion that this was the import of the majority opinion. *Allen v. McCurry*, 449 U.S. at 113 & n.12 (Blackmun, J., dissenting).

We understand the court's position to be that a state's failure to provide full and fair opportunity to litigate the issue might, within the conventional doctrine, *avoid* an otherwise appropriate application of collateral estoppel, *see Re-*

(footnote continued)

McCurry essentially, therefore, merely confirmed the general principle that had already been applied in earlier decisions of this court that under appropriate circumstances collateral estoppel might, within traditional bounds, apply to defeat § 1983 constitutional claims because the dispositive issues had earlier been decided adversely to the federal plaintiffs in state criminal actions. *See Wiggins v. Murphy*, 576 F.2d 572 (4th Cir. 1978) (per curiam) (attempt by § 1983 action to have state convictions expunged on federal grounds); *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977) (sixth amendment claim). To this general confirmation *McCurry* added only the point - on which we had expressed reservation in *Rimmer*, 567 F.2d at 276 - that this preclusion principle is not displaced with respect

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(footnote continues)
Statement (Second) of Judgments § 68.1 (1980), rather than the obverse, that provision of the full and fair opportunity, standing alone, gives rise to collateral estoppel. As the *McCurry* dissent points out, *Allen v. McCurry*, 449 U.S. at 113 & n.12, the effect of the latter would be to equate § 1983 collateral estoppel (issue preclusion) with bar (claim preclusion) under which the § 1983 claimant would be precluded from litigating any issue that *might* have been raised in the state criminal action. The majority flatly disclaimed this as its holding and we are of course bound by that perception.

to fourth amendment claims by the nonavailability under *Stone v. Powell* of an alternative federal habeas forum. And it emphasized, to an extent our decisions to date perhaps have not, the primary importance of the command embodied in 28 U.S.C. § 1738 to seek in the law of the judgment state the precise rule of conclusiveness to be applied to its criminal judgment.

Not therefore decided by the *McCurry* Court - indeed not specifically before it on the facts of that case[2] - was the narrow question which we address and to which we expressly confine decision here. That question is whether, and if so under what circumstances, a state court judgment entered on a guilty plea may be preclusive in a federal § 1983 action of an issue which in the state action was not actually litigated and could only have been litigated in relation to the exclusion of evidence on fourth amendment grounds.

We note preliminarily that this is a different question than the more inclusive one whether a guilty plea judgment may be preclusive as to any § 1983 issue, and the related one whether it may be preclusive as to an issue, that was an essential

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[2]In *McCurry* the state conviction was not based on a guilty plea but resulted from a trial following pre-trial denial of a motion to suppress evidence on fourth amendment grounds.

element of the state crime charged. To answer the narrow question we address is not necessarily to answer either of the others, and we expressly reserve decision on them.

It is also obviously a different question from those already authoritatively answered by our decisions in *Wiggins v. Murphy*, 576 F.2d 572, *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273, and, most recently, *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (per curiam), in each of which we gave issue preclusive effect in § 1983 actions to state judgments of conviction based upon adjudications of guilt rather than guilty pleas.[3] We therefore address it as a question of first impression on which our earlier decisions applying collateral estoppel in § 1983 cases are not dispositive.

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[3]In both *Rimmer* and *Wiggins* the specific constitutional violations charged in the § 1983 actions had been actually litigated in the state criminal trials as defenses or objections necessarily determined adversely to the state defendants. In *Cramer* the fundamental constitutional violation charged in the § 1983 action - an illegal search and seizure resulting in an alleged malicious prosecution - was not actually litigated at any stage, but as in both *Rimmer* and *Wiggins* the state judgment resulted from conviction after a trial. In *Cramer* we spoke of the defendant's failure to raise the constitutional objection at any stage as a "waive[r]." 648 F.2d at 945. *See* note 15 *infra*.

(1)

Under the command of 28 U.S.C. § 1738, *see McCurry*, 449 U.S. at 97-98 & n.11, we look first to the law of Virginia to determine whether, and to what extent, that state would give preclusive effect to the criminal judgment here in issue.[4]

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[4]The exact operation of § 1738 and its relationship to general policies of res judicata in the § 1983 context is not wholly clear. The questions have only emerged as potentially important ones with the relatively recent burgeoning of § 1983 litigation. *See generally Restatement (Second) of Judgments* § 134, Comment *d* (1980). Prior to the decision in *Allen v. McCurry*, there was a divergence of views about the relationship between § 1983 and § 1738 among both courts and commentators. *See generally* Comment, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. Mich. J. of L. Ref. 465, 486-88 (1981). It may well persist after *McCurry*. In that decision the Court did not directly address the question of the relationship between the two, but while apparently assuming their congruence, seemed also to suggest primacy for the command embodied in § 1738. *See McCurry*, 449 U.S. at 94-96. It is generally assumed that the command is to give to the state judgment the same effect - no more and no less - that the state courts would give it. *See Restatement (Second) of Judgments* § 134, Comment *g* (1980). In combination these principles of primacy for the state rule and exact enforcement of the state judgment according to its dictate would create a problem if the state rule were found to be at flat odds with "conventional doctrine." We do not face that problem here, since we find both the state rule and general principles of collateral estoppel to be sufficiently uncertain in their application to the particular

(footnote continued)

The Virginia decisions to which we have been directed do not yield a definitive answer. None has addressed the precise, narrow question of the preclusive effect of a guilty plea judgment upon issues that in the state criminal prosecution could only have been relevant to determining the admissibility of evidence. On broader questions of the preclusive effect of criminal judgments, the state's highest court stated in 1958 that the general rule in Virginia remained that expressed in 1916 in *Supervisors of Tazewell County v. Norfolk & Western Railway Co.*, 119 Va. 763, 91 S.E. 124 (1916) that

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Aetna Casualty & Surety Co. v. Czoka, 200 Va. 385, 105 S.E.2d 869, 872 (1958). In *Czoka*, a

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(footnote continues)
kind of issue here involved that no choice is forced. In consequence, we can reserve that thorny question for another day.

person in privity with the civil defendant had pled guilty to an offense that had as an essential element a dispositive issue in the civil action before the court. The plaintiff sought preclusive effect as to this issue from the criminal conviction. Applying the general rule from *Tazewell County*, the court refused any preclusive effect. The next year this general rule was again recognized, in dictum, as applying to criminal judgments, in *Smith v. New Dixie Lines, Inc.*, 201 Va. 466, 111 S.E.2d 434 (1959) (dictum: party sought to be precluded not party to criminal action nor otherwise bound by criminal judgment). So far as our research discloses, these two decisions remain the most recent pronouncements and applications of Virginia's general rule relating to the preclusive effect of *criminal* judgments.

To this general rule against preclusion, the Virginia courts have apparently applied only one narrow exception. A plaintiff, previously convicted of arson, has been held precluded by the conviction from recovering the proceeds of a fire insurance policy covering the building he was found guilty of burning. *Eagle, Star & British Dominions Insurance Co. v. Heller* 149 Va. 82, 89, 140 S.E. 314, 316 (1927). Subsequent decisions, adhering to the general rule, have simply recognized *Heller* as an exception to it. *See Smith v.*

New Dixie Lines, Inc., 201 Va. 466, 472-73, 111 S.E.2d 434, 438-39 (1959); *Aetna Casualty & Surety Co. v. Czoka*, 200 Va. 385, 389, 105 S.E.2d 869, 872 (1958).

These Virginia decisions seem, therefore, to establish that, except in the narrow context of the arson conviction in *Heller*, criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect in subsequent civil litigation.[5] Virginia's narrow rule of preclusion as announced in *Heller*, where conviction was by adjudicated guilt and where the issues precluded were esential elements of the crime charged, does not by necessary implication apply to the preclusive effect of guilty plea judgments upon other issues than those constituting essential elements of the crime. As indicated, that precise question has not, so far as our research discloses, been authoritatively addressed by the Virginia courts.

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[5]Virginia's general rule against preclusion by criminal judgments is rested upon the mutuality requirement, *see Aetna Casualty & Surety Co. v. Czoka*, 200 Va. 385, 105 S.E.2d 868, 872 (1958), a requirement that the Supreme Court of Virginia has recently declined to abandon, at least in cases of attempted "offensive" use. *Norfolk & Western Railway Co. v. Bailey's Lumber Co.*, 221 Va. 638, 272 S.E.2d 217 (1980) (citing *Aetna Casualty & Surety Co. v. Czoka* in support, but recognizing the *Heller* exception where defensive use was involved).

(2)

When we look to general principles of collateral estoppel, either as a guide to Virginia's likely view were the precise question presented to its highest court or as an independent source for the proper application of collateral estoppel doctrine to our issue,[6] the answer is again not definitively given.

It cannot be found with certainty in the recent *Restatement (Second) of Judgments* (1980), taking that as perhaps the best possible source for a responsible statement of "conventional doctrine" in this realm. This important secondary authority suggests that as a general proposition criminal judgments based upon guilty pleas can have no collateral estoppel effect as to *any* issues, because by definition none has been "actually litigated," *Restatement (Second) of Judgments* § 133, Comment *b* (1980), a fundamental predicate for issue preclusion in the Restatement's formulation, *see id.* § 68, Comment *e*. This general proposition is immediately hedged, however, by the concession that "[a] defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts *representing the elements of the*

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[6]See note 4 *supra*.

offense...not [as] a matter of issue preclusion...but [as] a matter of the law of evidence...," *Id.* § 133 Comment *b* [emphasis added].

This concession is forced by a significant number of decisions,[7] including several by other

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[7]These decisions have recently been collected in Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 Iowa L. Rev. 281 & nn. 122-25 (1980); Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 Cornell L. Rev. 464, 478-83 (1981) [hereinafter cited as *Modest Dissent*] in the course of that respected commentator's challenge to the *Second Restatement's* general position that an essential predicate for collateral estoppel is that the issues shall have been "actually litigated." The existence of these decisions is of course recognized in the *Second Restatement*, but their results, though conceded to be possibly "correct," are there ascribed to estoppel principles derived from the law of evidence rather than from traditional res judicata doctrine. *Id.* § 133, Comment *b*; Reporter's Note, Comments b and c. Many of the cases, however, clearly reveal an assumption that res judicata/collateral estoppel doctrine is being applied. Freed of any "mutuality" and "actually litigated" requirements, collateral estoppel doctrine would of course clearly apply, and Professor Vestal so explains the cases. *See* Vestal, *Modest Dissent*, *supra*, at 478-83. For our immediate purposes we have to assume that these decisions constitute elements in the body of "conventional" collateral estoppel doctrine to which *McCurry* requires our attention, notwithstanding the indications of a lack of scholarly consensus on the exact shape of that doctrine.

federal courts of appeals,[8] that have rather routinely found estoppel arising from guilty pleas notwithstanding the lack of actual litigation of the critical issues. With only a few exceptions,[9] these decisions finding preclusion in guilty pleas have concerned issues that represented elements of the crime charged. As to such "element-issues" it can with reason be said - and has been said in various ways - that though not actually litigated they have necessarily been judicially admitted by the plea, so that the criminal defendant is estopped to contest them in subsequent civil litigation. *See e.g., Brazzell v. Adams,* 493 F.2d 489, 490 (5th

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[8] *Brazzell v. Adams*, 493 F.2d 489 (5th Cir. 1974) (§ 1983 action); *Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977) (diversity action); *Hernandez-Uribe v. United States,* 515 F.2d 20 (8th Cir. 1975) (criminal action); *Ivers v. United States,* 581 F.2d 1362 (9th Cir. 1978) (federal civil action). All these decisions applied preclusion to issues which represented essential elements of the crime to which a guilty plea had been entered.

[9] *See Metros v. United States District Court for District of Colorado,* 441 F.2d 313 (10th Cir. 1971) (false arrest; illegal search); *Hooper v. Guthrie,* 390 F.Supp. 1327 (W.D. Pa. 1975) (false arrest; false imprisonment); *Palma v. Powers,* 295 F.Supp. 924 (N.D. Ill. 1969) (§ 1983 action for illegal search and seizure) (result criticized in Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems,* 66 Cornell L. Rev. 564, 581-84 (1981) [hereinafter cited as *Revisiting*], in the course of that author's response, as Reporter for the *Second Restatement,* to Professor Vestal's critique).

Cir. 1974); *Hernandez-Uribe v. United States*, 515 F.2d 20, 21 (8th Cir. 1975); *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978). If this then be conventional - or at least plainly emerging - doctrine respecting element-issue preclusion by guilty plea, the question remains whether it should apply as well to non-element issues, specifically, for our purposes, to the potential but unlitigated issue whether specific evidence of the crime should be suppressed on fourth amendment grounds.

(3)

Assuming, without deciding, that a state judgment based on a guilty plea should ordinarily[10] have preclusive effect in a later § 1983 action as to all issues representing essential elements of the crime, we do not think it should have preclusive effect as to potential but not actually litigated issues respecting the exclusion of evidence on fourth amendment grounds. There is a critical distinction, grounded in fundamental policies respecting the proper application of collateral estoppel, between the two types of issues.

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[10]Subject of course to the possible application of various "qualifications and exceptions" that within conventional doctrine may make collateral estoppel inappropriate in a particular case, including most fundamentally a lack of full and fair opportunity to litigate. *See McCurry*, 449 U.S. at 95 & n.7.

It related to the assurance that there was adequate *incentive* in the criminal proceeding fully to litigate the issue sought to be precluded.

Whatever the difference among courts and commentators as to the "actually litigated" requirement for issue preclusion, there has been general agreement - to the point of convention - that among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had not only a full and fair opportunity but an adequate incentive to litigate "to the hilt" the issues in question.[11] *See generally Restatement (Second) of Judgments* § 68.1(e)(iii), Comment (1980). With respect to issues representing the very elements of the crime charged, the adequacy of incentive to contest may be thought manifest in relation to any guilty plea. But it is not necessarily manifest with respect to potential but

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[11]It is possible to analyze the basic point of difference between the *Second Restatement*'s position and that of Professor Vestal on guilty plea preclusions as going as much to how and by whom "adequate incentive" is to be shown as to whether the "actually litigated" requirement has general application in collateral estoppel doctrine. *See Hazard, Revisiting, supra* at 584. But there is no disagreement that adequate incentive is a critical component of collateral estoppel.

unlitigated issues related to the exclusion of evidence on fourth amendment grounds.[12] A moment's reflection shows why.

Despite the most egregious violation of fourth amendment rights, it is quite conceivable that a state criminal defendant has no real incentive to seek suppression of the resulting evidence because the state has so sufficient an amount of untainted evidence that making the effort would in the end be futile and possibly even harmful to the defendant's immediate interests. In that situation, while a guilty plea might be thought, despite the lack of actual litigation, to be properly preclusive of element-issues, we think it should not be preclusive of the search and seizure issue. On the other hand, there is always the possibility that in a particular case a guilty plea has been entered when the only available evidence on critical issues was search and seizure evidence. In that situation, there was obviously as

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[12] Lying perhaps between these two types of issues and presenting still different sets of considerations are issues that in the criminal actior represented not elements of the crime but of potential absolute affirmative defenses such as entrapment or stop-gap objections that had no evidence exclusion implications. On these we reserve decision, simply noting that each presents incentive-to-litigate problems that may differ in critical respects from those presented by evidence-suppression issues.

much incentive to litigate the suppression issue as any representing essential elements of the crime, and if preclusion is finally to turn on incentive, it should in that situation result as well for the evidentiary as for the element-issue.

This could of course be determined on a case by case basis, with the question whether the one situation or the other was present being addressed in the § 1983 action as one of fact incident to determining the collateral estoppel defense. *Cf. Restatement (Second) of Judgments* § 68, Comment *f* (1980) (extrinsic evidence to determine what issues litigated). Fair resolution of this factual question could be expected, however, frequently to be difficult. Relevant evidence would consist of such state court records of proceedings incident to the guilty plea as might be available and any extrinsic evidence bearing upon the scope of the state's evidence and the defendant's knowledge of it at the critical time. It is of course true that however sparse and ambiguous this evidence might be, the incentive question could and would nevertheless finally be resolved in every case, as are many other difficult issues, through the ultimately decisive leverage of proof burdens.[13] But while the question could always in

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[13]That the proper cast of this burden might itself present a difficult problem, *see Hazard,*

(footnote continued)

the end be resolved by the usual processes, many times fairly and occasionally even rather easily, we think that on balance the game is not worth the candle. The question is so likely to be one incapable of fair and expeditious resolution in the run of § 1983 actions that we believe a general rule of non-preclusion should obtain with respect to search and seizure issues in guilty plea cases.

Such a rule, we think, is amply justified by those general policies which emphasize the need for judicial flexibility in accommodating conflicting values of finality, fairness, and public confidence in applications of res judicata. *See generally Restatement (Second) of Judgments*, Ch. 1, Introduction pp. 12-15 (1980); *id.* § 68.1. It is conformable under 28 U.S.C. § 1738 to Virginia decisions respecting the preclusive effect of its criminal judgments.[14] And it is compatible with our own prior decisions respecting the estoppel effect of state criminal judgments in § 1983 actions.[15]

(footnote continues)

Revising, supra at 584. The problem is not of course before us, but its existence may properly be taken into account as an added difficulty in resolving the incentive question on a case by case basis.

14 *See* Part III B (1).

15 *See* cases cited at note 3 *supra*. As there indicated, in all three of the cases, *Wiggins,*

(footnote continued)

The price exacted by such a flat rule of non-preclusion is the opportunity it affords state prisoners who pled guilty in state courts to litigate for the first time in § 1983 actions search and seizure issues that might have been but were

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(footnote continues)

Rimmer, and *Cramer*, in which we have given issue preclusive effect in § 1983 actions to state court judgments of conviction, the judgments were based upon adjudications of guilt after trial. None involved guilty pleas. Additionally, in both *Wiggins* and *Rimmer*, the issues precluded had been "fully litigated" and determined adversely to the § 1983 plaintiff in the state criminal action. This further distinguishes those decisions in a critical respect. In *Cramer*, the precluded issue had not been fully litigated in the state criminal action where it was potentially an evidence suppression issue. *Cramer* is therefore the case in the trilogy most like the instant case in those respects critical to application of collateral estoppel doctrine: there, as here, the issue was not an element-issue, and it was not fully litigated. But it differs in yet another critical respect which justified preclusion there but makes it inappropriate here. In *Cramer*, it was manifest from the record that the evidence used to convict in the state criminal prosecution was that obtained by the search and seizure which formed the basis for the § 1983 action. This made equally manifest the § 1983 plaintiff's "adequate incentive" to seek its suppression in the state action. It is precisely because the guilty plea obscures what was manifest in *Cramer* that we hold here against preclusion.

not raised[16] in state criminal actions. Given the obvious disincentive to forego meritorious suppression motions in the criminal action, *see McCurry*, 449 U.S. at 104 n.23, and the subsequent disincentive (however modest some may consider it) to advance frivolous search and seizure claims in the § 1983 action, we think the price not an exorbitant one in terms of judicial resources and the public interest even if there were no countervailing considerations. And there are of course such considerations. First, there is the avoidance by this means of any necessity to devote effort and resources in the § 1983 action to the resolution of a peripheral factual question of incentive that, as indicated, is likely to be difficult and frequently incapable of fair resolution in that collateral setting.

More important is the fact that since *Stone v. Powell*, 428 U.S. 465 (1976), the § 1983 federal

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[16]Still another variant on the narrow question we decide would be that presented by an unsuccessfully litigated suppression motion followed by a guilty plea. Whether that situation should be thought controlled by our "fully litigated" decisions, or by this one, or be treated as presenting still different collateral estoppel problems, we need not here decide. *See, e.g., Restatement (Second) of Judgments* § 41, Comment *g* (1980) (finality for issue preclusion purposes); *id.* § 68.1(a), Comment *a* (effect of inability to obtain appellate review).

forum is the only one available for assertion of this particular constitutional claim. Though the Supreme Court has specifically rejected this as a sufficient reason for blanket disallowance of collateral estoppel in § 1983 actions involving fourth amendment claims, *McCurry*, 449 U.S. at 102-05, it remains a legitimate reason - well within "conventional doctrine" - for systematically disallowing it in the narrow and concededly marginal circumstance for applying collateral estoppel that is created by guilty pleas. See generally *Restatement (Second) of Judgments* § 88, Comments *b* and *d* § 68.1(e), Comment *g* (1980); *see also Allen v. McCurry*, 449 U.S. at 115 (Blackmum, J., dissenting) (emphasizing different case of search and seizure issues in the two proceedings).

IV

For the reasons given in Part III, we reverse and remand for further proceedings consistent with this opinion that portion of the judgment of the district court which dismissed, on waiver and estoppel grounds, Prosise's search and seizure claim. For reasons given in Part II, that portion of the judgment dismissing Prosise's excessive force claim is affirmed.

AFFIRMED IN PART
REVERSED AND
REMANDED IN
PART

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

December 30, 1981

TO: Norman A. Townsend, Esq.
Sebastian K. D. Graber, Esq.
David R. Lasso, Esq.
Charles G. Flinn, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 79-6310 this date.

The Court's opinion is enclosed.

* * *

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed March 19, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant; et al,

Appellees.

O R D E R

The appellees' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is denied by an evenly divided court.

Entered at the direction of Judge Phillips for a panel consisting of Judge Winter, Judge Butzner, Judge Russell, Judge Widener, Judge Hall, Judge Murnaghan and Judge Chapman would have granted rehearing en banc.

For the Court

/s/ WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed March 29, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer; and
GARBER, Officer,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of

certiorari to this court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court - by Direction.

/s/ WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed April 28, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer; and
GARBER, Officer,

Appellees.

O R D E R

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed for an additional 30 days to and including, May 28, 1982, pending application of the appellees in the

Supreme Court of the United States for a writ of certiorari to this court.

For the Court - by Direction.

/s/ WILLIAM K. SLATE, II
CLERK

Office - Supreme Court, U.S.
FILED
JUN 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2169

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

GILBERT A. HARING, HENRY W. ALLEN,
J.R. BADEY, ALVIN BEUCHERT, THOMAS TRUMBLE,
AND STANLEY GARBER,
Petitioners,

v.

JOHN FRANKLIN PROSISE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is respondent precluded by the conventional doctrine of collateral estoppel from litigating in an action under 42 U.S.C. § 1983 a fourth amendment claim which was not raised or litigated in his state criminal prosecution?

II. Does this Court's decision in *Allen v. McCurry* leave the circuit courts free to adopt a conventional definition of collateral estoppel which gives no preclusive effect in a subsequent § 1983 action to a plea of guilty in an earlier state criminal prosecution?

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, John Franklin Prosise, respectfully opposes the petition of Gilbert A. Haring, Henry W. Allen, J.R. Badey, Alvin Beuchert, Thomas Trumble and Stanley Garber for a writ of certiorari to the Fourth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit reversing the district court is reported at 667 F.2d 1133 (1981), and is set forth in the appendix to the petition for writ of certiorari at pp. 7a-34a (here-

inafter App. at 7a-34a). The March 19, 1982 order of the circuit court denying a petition for rehearing and suggestion for rehearing *en banc* by an evenly divided court is unreported, but is set forth in the appendix (App. at 5a-6a). The April 17, 1979 order of the district court dismissing respondent's *pro se* complaint is unreported, but is set forth in the appendix (App. at 35a-45a).

JURISDICTION

The order of the United States District Court for the Eastern District of Virginia, Alexandria Division, was entered on April 17, 1979 in *John F. Prosise v. Lt. Gilbert A. Haring, et al.*, Civil Action No. 79-105-AM (App. at 35a-45a). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 30, 1981 in *Prosise v. Haring, et al.*, Docket No. 79-6310 (App. 7a-34a). The petition for rehearing was denied by the panel of the circuit court, and the petition for rehearing and the suggestion for rehearing *en banc* was denied by an evenly divided court on March 19, 1981 (App. at 5a-6a). The petition for writ of certiorari was timely filed May 24, 1982, and was received by respondent on May 27, 1982. Petitioners invoke 28 U.S.C. § 1254(1) to seek review of the judgment of the Fourth Circuit Court of Appeals by way of a writ of certiorari to that court. The circuit court has stayed its mandate pending resolution of the case by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738 provides in pertinent part:

> Such Acts, records and judicial proceeding [of a state] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In February, 1979, respondent filed a hand-written *pro se* complaint under 42 U.S.C. § 1983 alleging, *inter alia*, that when he was arrested on an unrelated charge

in September, 1977, the arresting officers illegally searched respondent's apartment and fraudulently altered the crime scene to create a plain view observation later used to obtain a search warrant for the apartment. Respondent sought money damages for the illegal search of his apartment and for the fraudulent alteration of the crime scene to manufacture probable cause to support the warrant authorizing the search of his apartment.

Among other things, petitioners moved for the § 1983 complaint to be dismissed raising as an affirmative defense the collateral estoppel effect of respondent's plea of guilty in state court to manufacturing a controlled substance based in substantial part upon evidence seized under authority of the alleged fraudulently obtained search warrant. The district court granted the motion to dismiss the complaint, holding, *inter alia*, that respondent was collaterally estopped by his plea of guilty in state court to litigate the lawfulness of the search of his apartment in federal court. In the alternative, the court ruled that respondent had waived the fourth amendment claim upon the reasoning of *Tollett v. Henderson*, 411 U.S. 258 (1973).

Respondent appealed this decision to the Fourth Circuit Court of Appeals arguing, *inter alia*, that state law governs the application of issue preclusion in an action under § 1983, and that Virginia has steadfastly refused to give preclusive effect in a civil action to a judgment rendered or to facts decided in a criminal prosecution. Moreover, respondent argued that the opinion of this Court in *Allen v. McCurry*, 449 U.S. 90 (1980) leaves the circuit court free to adopt the conventional Virginia interpretation of issue preclusion which does not bar respondent's action raising fourth amendment claims which could have been but were not litigated in his state criminal prosecution. Finally, respondent argued that issue preclusion is a separate and distinct defense from claim preclusion, and that the former does not

include the element of waiver that claim preclusion contains, so that he is not barred by principles of either issue preclusion or waiver from litigating this claim.

A panel of the circuit court held that respondent's guilty plea neither waived nor barred this § 1983 action for damages based upon the allegedly illegal search of respondent's apartment. The judgment of the district court dismissing respondent's fourth amendment claim was reversed, and the matter was remanded to the trial court for further proceedings consistent with the circuit court's opinion.

A petition for rehearing with suggestion of rehearing *en banc* arguing that the panel decision overlooked facts and controlling law of the circuit, and pointing to an opinion of another panel of the court which petitioners argued was in conflict with the panel decision in this case, was denied by the panel and by the evenly divided court. Two stays of the mandate were entered by the circuit court, the final one staying the mandate of that court to and including May 28, 1982 to afford petitioners the opportunity to file in this Court a petition for writ of certiorari. A timely petition was filed, and this opposition to that petition follows.

The facts leading to respondent's arrest and which preceded the search at issue are largely not disputed and are set out in the Statement of the Case to the Petition for Certiorari (Petition, pp. 4-6) and in the opinion of the circuit court (App. at 8a-9a). The facts relating to what occurred in respondent's apartment after his arrest are in dispute and must be determined upon remand to the district court. The Court is respectfully directed to the opinion of the circuit court for a statement of what occurred as gleaned from petitioners' affidavit submitted in support of their motion for summary judgment in the district court. (App. at 9a-10a.)

REASONS FOR DISALLOWING THE WRIT

I. INTRODUCTION.

Review by writ of certiorari generally is reserved to resolve questions involving significant federal constitutional claims not capable of resolution on adequate state grounds, and which have resulted in a conflict among the circuits over the proper application or interpretation of a constitutional principle. It is not intended to afford disgruntled litigants an opportunity to have reviewed by this Court a decision of a court below with which they disagree.

Although petitioners have carefully framed their allegations so as to allege that the opinion below is in conflict with decisions of other circuits and is at odds with decisions of this Court, a careful review of the cases and the opinion below reveals that neither allegation is true. On the contrary, rather than being decided in a manner at odds with federal law and precedent, the opinion below is fully supported by the decision of this Court in *Allen v. McCurry* and has as its foundation an adequate state basis for the decision. Consequently, there exists no substantial federal question or conflict among the circuits which is ripe for resolution by this Court.

II. STATE LAW GOVERNS THE PRECLUSIVE EFFECT UPON § 1983 ACTIONS OF PRIOR STATE COURT JUDGMENTS, AND VIRGINIA GIVES NO PRECLUSIVE EFFECT IN CIVIL ACTIONS TO PRIOR CRIMINAL PROCEEDINGS.

In *Allen v. McCurry*, 449 U.S. 90 (1980) this Court reversed the decision of the Eighth Circuit Court of Appeals which held that a § 1983 plaintiff is free to litigate unencumbered by principles of res judicata fourth amendment issues which had been litigated and decided adversely to the § 1983 plaintiff in his state criminal trial. In so doing, the Court reserved for res-

olution by the circuit court "*how* the body of collateral estoppel doctrine or 28 U.S.C. § 1738 should apply in [the] case," *id.*, 449 U.S. at 105 n.25, noting only that in 28 U.S.C. § 1738:

> Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so.

Id., 449 U.S. at 96.

Recognizing this obligation, the opinion below looked first to the law ot Virginia "to determine whether, and to what extent, that state would give preclusive effect to the criminal judgment here at issue." *Prosise v. Haring*, 667 F.2d 1133, 1138 (4th Cir. 1981). Although expressing doubt as to the "exact operation of § 1738 and its relationship to general policies of *res judicata* in the § 1983 context," the court noted that "[i]t is generally assumed that the command is to give to the state judgment the same effect—no more and no less—that the state courts would give it." *Id.*, at 1138 n.4.

Whatever the precise nature of this relationship, the *Allen* Court made it clear that the circuit courts are free to apply the conventional doctrine of collateral estoppel as interpreted and applied by the various states. *Allen*, 449 U.S. at 95 n.7. Consequently, because the issue presented in this case can be resolved by resort to Virginia law, under authority of § 1738 this Court is bound by the state's application of collateral estoppel.

As noted in the opinion below, the general rule in Virginia is that:

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Prosise, 667 F.2d at 1139 *quoting Aetna Casualty & Surety Co. v. Czonka*, 200 Va. 385, 105 S.E.2d 869, 872 (1958). However, because the precise question involving the exclusion of evidence on fourth amendment grounds had never been decided by the state court, the opinion below declined to rest its decision exclusively on state grounds.

What the circuit court overlooked, though, is that even when collateral estoppel applies, the party asserting it has the burden of proving that the precise issue or fact he seeks to preclude was raised and determined in the first action, and that collateral estoppel bars litigation of the issue or fact in the subsequent civil action. *Clodfelter v. Commonwealth*, 218 Va. 98, 235 S.E.2d 340 (1977). Moreover, in Virginia collateral estoppel does not apply if it appears that the prior judgment could have been grounded on any facts or issues other than those sought to be precluded. *Lee v. Commonwealth*, 219 Va. 1108, 254 S.E.2d 126 (1979).

The opinion below therefore can be fully supported by resort to state law without resolution of the federal question advanced by petitioners in this Court. In sum, because Virginia gives no collateral estoppel effect whatsoever to criminal convictions in subsequent civil actions,[1] petitioners cannot sustain their burden of proving that respondent was estopped from litigating the fourth amendment claim in this case. Moreover, because the record reveals that respondent's guilty plea could have been supported by evidence independent of the search

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[1] A single limited exception to this general rule of non-preclusion has been recognized in Virginia in *Eagle, Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927) in which the civil plaintiff sought to recover under an insurance policy for the loss of goods he previously had been convicted of intentionally burning. Even in such cases, however, Virginia limited the exception to cases in which the party against whom estoppel is asserted "has once litigated the identical question and had it adversely decided in the criminal trial." *Id.*, 140 S.E.2d at 316.

at issue, Virginia law does not bar this issue from being litigated at this time.

There existing these independent state grounds for sustaining the opinion of the circuit court, there is no need for the Court to resolve the federal questions advanced by petitioners. The Court should refrain from reaching out to resolve questions not essential to the opinion below, and which therefore are not ripe for resolution. The command of Congress is that state law controls on such matters, and this Court should apply state law where it can readily be ascertained. Respondent respectfully urges the Court to decline the petitioners' invitation to ignore that command of 28 U.S.C. § 1738 for federal courts to apply state law.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS OVER THE PROPER INTERPRETATION OF *ALLEN v. McCURRY* OR THE CORRECT APPLICATION OF THE CONVENTIONAL DOCTRINE OF COLLATERAL ESTOPPEL.

Not surprisingly, petitioners have pointed to no circuit court decisions which were decided after *Allen v. McCurry* which are contrary to the opinion below. Instead, petitioners claim a conflict with a decision of the Tenth Circuit which predates *Allen* by almost ten years, and which itself is at odds with the spirit if not the letter of *Allen*. Specifically, petitioners have pointed to *Metros v. United States District Court for the District of Colorado*, 441 F.2d 313 (10th Cir. 1971) in which the court held that a failure by the § 1983 plaintiff to litigate in state court the legality of the search which resulted in the seizure of all the evidence used to support his guilty plea barred him from raising the claim in the subsequent federal action.

As an initial matter, the *Metros* court did not have the benefit of *Allen* in which this Court noted that although some issues of law or fact regarding a criminal

defendant's arrest and trial might necessarily be decided by a conviction, other issues arising out of the arrest or trial are not necessarily decided by the conviction. *Allen*, 449 U.S. at 93 n.2. Moreover, *Allen* held that the availability of collateral estoppel as an affirmative defense would not prevent a § 1983 plaintiff from raising an issue he might have raised in his criminal trial but did not. *Id.*, n.5. Consequently, it is not at all clear that the Tenth Circuit would rule again as petitioners argue it did in *Metros* were the court to reconsider the question anew in light of *Allen*.

In sum, the question decided below has been considered by no circuit court other than the court below since this Court decided *Allen* and remanded that case to the circuit court to decide "*how* the body of collateral estoppel doctrine or 28 U.S.C. § 1738 should apply." For that reason, the circuits should be permitted the opportunity to fully develop the answers to that question, and to adequately frame the issues needing to be resolved by this Court before the question is accepted for review.

IV. THE DECISION BELOW DID NOT OVERLOOK THAT THE GUILTY PLEA MAY HAVE BEEN BASED UPON SEIZED EVIDENCE, BUT REJECTED SUCH FACTORS IN FAVOR OF A GENERAL RULE OF NON-PRECLUSION IN GUILTY PLEA CASES.

The petitioners argue that the circuit court "failed to consider the express finding by the state court that the search and seizure was the basis of the conviction." Petition for Writ of Certiorari at 15. Aside from the fact that this Court does not sit to correct arguably incorrect decisions below, the circuit court did not overlook this express finding by the state court but rather rejected such an analysis in favor of a "general rule of non-preclusion . . . in guilty plea cases." *Prosise*, 667 F.2d at 1142. Consequently, the circuit court did not overlook

the factual basis of respondent's guilty plea, but rejected the factual basis as a useful way of determining the preclusive effect to be given his plea.

In support of the argument that respondent waived his fourth amendment claim in this § 1983 action by pleading guilty in state court, petitioners have pointed to no case recognizing such a waiver principle. Instead, petitioners point repeatedly to cases holding that such issues are waived in subsequent habeas corpus actions seeking release from custody on the basis of previously unlitigated fourth amendment claims. Because there are no cases supporting petitioners' argument, no conflict exists among the circuits on a substantial federal question warranting resolution by this Court.

As support for the argument that respondent's guilty plea estoppes this § 1983 action, petitioners continually fail to discuss the erosion of the distinction between issue preclusion and claim preclusion which is engendered by their position. Instead, petitioners rely upon cases which in reality turn on questions of waiver, *see Palma v. Powers*, 295 F.Supp. 924 (N.D.Ill. 1969); *Hooper v. Guthrie*, 390 F.Supp. 1327 (W.D. Pa. 1975); and *Metros v. United States*, 441 F.2d 333 (10th Cir. 1972), although each case stated its holding in terms of estoppel. This Court should not perpetuate the erosion of the conventional doctrine of collateral estoppel as petitioners urge it to do. Moreover, the circuits should be left to consider the proper application of 28 U.S.C. §1738 and the principles of collateral estoppel to § 1983 cases as *Allen* directed them to do.

V. THE DECISION BELOW WILL NOT ENCOURAGE INCREASED LITIGATION UNDER 42 U.S.C. § 1983 BY STATE PRISONERS.

The petitioners also argue that the decision below will "encourage countless state prisoners to litigate claims of unlawful search and seizure and to challenge their state court convictions through § 1983 actions," as if that is

a sufficient basis for granting review in this case. Moreover, petitioners' argument ignores the fact that rather than create a new remedy or cause of action by its decision below, the circuit court merely analysed a traditional defense in the context of a well-established form of civil action.

In short, the right to sue under § 1983 for an illegal search has existed as long as the statute itself. For that reason, the decision below did not create a right of action where none previously existed. Consequently, one cannot assume that the circuit court's decision in this case will engender a new wave of civil litigation sufficient to prompt this Court to intervene at this early stage of the development of the issue by the various circuit courts.

CONCLUSION

By seeking to have this Court review a decision of the circuit court which conflicts with no decision of this Court or of any other circuit court, petitioners have lost sight of the reasons for allowing a writ of certiorari. Although it may be true as petitioners assert that "[t]here is nothing inherently unfair" in giving preclusive effect to a guilty plea, no decision of this or any other court has precluded the Fourth Circuit from adopting an interpretation of the conventional doctrine of collateral estoppel which refuses to give any preclusive effect to a guilty plea. On the contrary, this Court in *Allen* indicated that conventional principles of collateral estoppel are appropriate in § 1983 cases, and suggested that the circuit courts should consider the exact nature of the doctrine of collateral estoppel to be applied.

In short, this case presents neither a substantial federal question nor a significant conflict among the circuits on the precise issues presented by the case. As a consequence, no reason exists for the Court to allow the writ in this case. On the contrary, the Court should

permit the circuits to fully analyze and develop the precise nature of the relationship between 28 U.S.C. § 1738 and 42 U.S.C. § 1983 before answering the questions advanced by petitioners.

Respectfully submitted,

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OCTOBER TERM, 1981

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HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHERT, Officer;
THOMAS TRUMBLE, Officer;
STANLEY GARBER, Officer,

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JOHN FRANKLIN PROSISE,

Respondent.

On Writ Of Certiorari to the United States
Court of Appeals for the Fourth Circuit

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can a person who has pleaded guilty in a state criminal court to manufacturing illegal drugs, and who did not raise the validity of search that produced the essential evidence of the crime, subsequently bring an action in a federal court under 42 U.S.C. § 1983 claiming that the search was unconstitutional?

a. By pleading guilty in a state criminal court, does a person waive any right to litigate in a § 1983 action the constitutionality of the search which produced the essential evidence of the crime?

b. Does a conviction based upon a plea of guilty collaterally estop the later litigation in a federal court § 1983 action of the search and seizure claim, where the state court expressly found a sufficient factual basis for the plea and that basis was the evidence produced by the search?

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No. 81-2169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GILBERT A. HARING, Lieutenant,
Arlington County Police Department;
HENRY W. ALLEN, Detective;
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vs.

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Respondent.

On Writ Of Certiorari to the United States
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REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REPLY TO ARGUMENT MADE BY PROSISE IN HIS OPPOSITION BRIEF

I. INTRODUCTION.

Prosise unfairly characterizes the petitioning police officers as merely "disgruntled litigants." Response Brief at p. 6. To support this claim he

makes several arguments: (1) the Fourth Circuit erroneously interpreted the Virginia law of estoppel; (2) there is no conflict between the Fourth and Tenth Circuits on this matter because it is "not at all clear" the Tenth Circuit[1] would rule the same as it did; (3) the Fourth Circuit did not overlook the finding of the state court that the search provided the factual basis of the guilty plea but rather chose to ignore such findings "in favor of a general rule of non-preclusion in guilty plea cases;" and (4) the officers provided no cases other than those involving subsequent habeas corpus proceedings where waiver was applied. These arguments are without merit.

Prosise then inconsistently concludes his brief by requesting a denial of certiorari so that the circuits can have more time to "fully analyze

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[1]See the case of *Metros v. United States District Court for District of Colorado*, 441 F.2d 313 (10th Cir. 1971), where the Tenth Circuit held that a guilty plea would bar the subsequent civil litigation of the arrest and the search that took place in the criminal case. Prosise did not address the petitioner's argument that the Fourth Circuit's decision also conflicts with decisions from the First and Ninth Circuits where it was held that prior pleas of guilty were waivers of the right to raise certain issues in a subsequent suit for a tax refund and in a suit for forfeiture. See *Frontneau v. United States*, 654 F.2d 8 (1st Cir. 1981), *United States v. $31,697.59 Cash*, 665 F.2d 903 (9th Cir. 1981). These cases do not involve habeas corpus.

and develop the precise nature of the relationship between 28 U.S.C. § 1738 and 42 U.S.C. § 1983 before answering the questions advanced by the petitioners." This conclusion suggests that the Petition does raise significant federal questions but that they should go without resolution pending the further development of a legal issue which the Fourth Circuit found it need not and should not address. *Prosise v. Haring*, 667 F.2d 1133, fn. 4 at 1138 (4th Cir. 1981). There are many reasons why the arguments advanced against the grant of a writ of certiorari are not persuasive, and they are set out below.

II. THE EFFECT OF 28 U.S.C. § 1738.

This Court need not reach the question of precisely how 28 U.S.C. § 1738 would work in a case where the state's law would *deny* preclusive effect to a guilty plea.[2] This is because Virginia

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[2]The *Prosise* circuit court admitted, the "exact operation of § 1738 and its relationship to the general policies of res judicata in the § 1983 context is not wholly clear." *Prosise v. Haring*, 667 F.2d 1133, fn. 4, 1138 (4th Cir. 1981). The *Prosise* court went on to note that a divergence of views exists "among both courts and commentators." *Id.* Serious problems of uniformity in the federal circuits would result if every state's rule of collateral estoppel were automatically followed because of the differences in the states' law. This Court may have answered some of these concerns in *Kremer v. Chemical Construction Corp.*, ___

(footnote continued)

law is not settled on this point. And contrary to what *Prosise* argues, the law in Virginia which does exist indicates a Virginia court would not permit Prosise's civil damage action.[3] What Prosise would have this Court believe is that the very same Virginia court which found that the search provided the factual basis for the conviction would allow Prosise to attack that conviction by claiming the search was unconstitutional.

The Virginia Supreme Court held in *Eagle, Etc. Insurance Co. v. Heller,* 149 Va. 82, 140 S.E. 314 (1927), that it would, given adequate justification, invoke collateral estoppel despite the usual

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(footnote continues)

U.S. ___, 102 S.Ct. 1883 (May 17, 1982). (§ 1738 requires federal court to use res judicata rule of state court which has effect of precluding Title VII federal action.)

[3]In adopting a flat-rule of non-preclusion as to unlitigated issues in guilty plea cases, the Fourth Circuit said such a rule "is conformable under 28 U.S.C. § 1738 to Virginia decisions respecting the preclusive effect of its criminal judgments." *Prosise, supra* at 1142. If this is meant to imply that Virginia would deny preclusive effect to Prosise's guilty plea in these circumstances, the petitioners would argue that such a conclusion is without support. See the text above. Petitioners interpret the Fourth Circuit's statement as simply recognizing the fact that the Virginia Supreme Court has not had an occasion to issue a published opinion in a similar case.

rule of mutuality. Estoppel was used defensively in the *Eagle v. Heller* case, when a convicted arsonist tried to recover on a fire insurance policy on the very house he burned.

More recently the court indicated in *Luke Construction Company v. Simpkins*, 223 Va. _____, 223 VRR 340 (April 30, 1932) (per curiam), that there are circumstances other than that of the *Eagle v. Heller* case where it would apply collateral estoppel despite the lack of mutuality. *Id.* at 223 VRR 341. Hence, *Eagle v. Heller, supra*, does not represent a "single limited exception to this general rule of non-preclusion...."[4] Although Prosise argues that Virginia's law of estoppel only applies to issues "actually litigated" and thus would never apply to a guilty plea situation, Virginia has never issued a published opinion on what issues, if any, might be necessarily decided

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[4]Prosise's argument that there was other "evidence independent of the search" (Opposition brief at page 8) that could have supported the plea cannot be taken seriously. Prosise provides no citation to any part of the record which would tend to support such a claim. The claim is directly contrary to the state court's express finding that the factual basis of the plea of guilty was the evidence produced by the search (Pet. App. at p. 58a) and ignores the difficult burden on the prosecution to prove the act of manufacturing drugs. The chemicals, apparatus and experts' analysis of the chemicals would be needed to convict.

by a guilty plea.[5] If one assumes that Virginia would be inclined to follow the "conventional" estoppel doctrine then one would expect Virginia to apply estoppel in at least some cases involving guilty pleas; even the *Prosise* court admits that actual litigation is not an element of the "conventional - or at least plainly emerging" doctrine of estoppel. *Prosise, supra* at 1140.

There are two additional elements present in *Prosise* which distinguish it from those Virginia cases relied on by Prosise. See, e.g., *Aetna Casualty & Surety Co. v. Czonka,* 200 Va. 385,

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[5]The officers have found one case where the Virginia Supreme Court has considered the preclusive effect of a guilty plea. In *Souders v. Gabrielson, et al.*, Record No. 741124, the Virginia Supreme Court denied a writ of error to a July 18, 1974, judgment of Charles S. Russell of the Arlington County Circuit Court (Law No. 15840). Judge Russell is now a member of the Virginia Supreme Court. The circuit court held that the civil plaintiff's prior plea of guilty to drunk in public and assault and battery of the arresting officers precluded the plaintiff's subsequent damage action against the arresting officers for unlawful use of force. The Virginia Supreme Court said that it reviewed the record in the circuit court and found "no reversible error." See the appendix to this reply for the plea of estoppel and res judicata, the circuit court's order sustaining the plea of res judicata and estoppel, the notice of appeal and assignments of error and the Virginia Supreme Court's denial of the writ of error.

105 S.E.2d 869 (1958). The first element in *Prosise* is the substantial identity of the parties in the criminal prosecution and in the subsequent § 1983 action. See *Moran v. Mitchell*, 354 F.Supp. 86 (E.D. Va. 1973). The second element is that the "causes of action" in the two proceedings are also substantially the same. According to the Virginia Supreme Court the scope of "cause of action" varies "with its context and is broadly characterized as an assertion of particular legal rights which have arisen out of a definable factual transaction." *Bates v. Devers*, 214 Va. 667, n. 8, 672, 202 S.E.2d 917, at n. 8, 921 (1974).

As can be seen, there is an absence of an authoritive determination by Virginia of the effects of collateral estoppel and waiver[6] after a guilty plea. Because of this, § 1738 does not prevent this Court from establishing a rule of preclusion to be applied in the federal courts in such circumstances. Using existing Virginia law as a guide, it would appear that the Virginia Supreme Court might very well give preclusive effect to Prosise's guilty plea. Certainly, a flexible rule of

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[6]The Fourth Circuit simply dismissed the notion of waiver on the grounds it was only applicable to subsequent habeas corpus proceedings. *Prosise, supra* at 1136-37. The circuit court did not discuss the question of whether Virginia would apply the principles of waiver to the case at bar.

preclusion is conformable under § 1738 to Virginia law.

III. THERE IS A CONFLICT IN THE CIRCUITS.

Prosise's argument that there is no conflict in the circuits on the questions presented to the Court is premised on a misunderstanding of what this Court said in *Allen v. McCurry*, 449 U.S. 90 (1980). He implies at pages 9 and 10 of his opposition brief that the Tenth Circuit would probably change its position in light of *Allen v. McCurry*. *See, Metros v. United States District Court*, 441 F.2d 313 (10th Cir. 1971). Prosise's speculation is premised on two points: (1) *Allen v. McCurry* noted that certain issues "arising out of the arrest are not necessarily decided by the conviction. *Allen* at 449 U.S. at 93 n. 2," and because (2) "*Allen* held that the availability of collateral estoppel as an affirmative defense would not prevent a § 1983 plaintiff from raising an issue he might have raised in his criminal trial but did not. *Id.* at [449 U.S.] at n. 5." Opposition brief at p. 10. However in footnote 2 of *Allen v. McCurry*, this Court specifically said only that "questions as to the scope of collateral estoppel with respect to the particular issues in this case are not now before us." In footnote 5, the *Allen* Court said that contrary to the claim of the

dissent "this case does not involve the question of whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation." In sum, the *Allen v. McCurry* decision has not in the least weakened the analysis of the Tenth Circuit in *Metros;* in fact, the *Allen* decision removes a cloud over the *Metros* case which existed when some circuit courts refused to apply estoppel in cases where its application cut off access to a federal forum for the assertion of the constitutional issue.

The Tenth Circuit's analysis in *Metros* is as viable today as it was when it was first rendered. The *Metros* court examined the state court record and found that the search sought to be relitigated in the civil action was most important to the prior criminal prosecution and was an issue necessarily determined by the conviction. The court said:

> "It would seem unnecessary to discuss at length the effect of a plea of guilty as applied to the issue before us, other than to note a wider application of the preclusion rule to prior criminal cases where a guilty plea has been entered than to those actually tried. It is sufficient to note that such a plea is conclusive as to all but jurisdictional issues." *Metros v. United States District Court, supra* at 317.

A very recent case of the Fifth Circuit, which was unavailable to the Petitioners at the time of their filing, is *Southern Jam, Inc. v. Robinson*, 675 F.2d 94 (May 6, 1982). There the court examined the effect of *Allen v. McCurry* and concluded that "as long as the parties had a full and fair opportunity to litigate their constitutional allegations in the prior state court proceedings [citation ommitted], the defense of res judicata is viable in a subsequent § 1983 action." *Southern Jam, supra* at 97. In *Southern Jam* the circuit court applied Georgia law. Because the 1983 plaintiff had failed to raise any constitutional objections to an ordinance in a prior state court enforcement proceeding against the plaintiff, the plaintiff was barred by res judicata from raising the constitutional issues in the 1983 action.

As can be seen by the *Southern Jam* case, the doctrine of res judicata is also appropriate to the *Prosise* case. Virginia, like Georgia, also follows the rule that res judicata bars the subsequent litigation of all claims that were or could have been litigated in an earlier action between the same parties provided the claims arise from the same "cause of action." See the text above in Section II of this brief.

What is important is that the Fifth Circuit has taken the position that the doctrine to be

applied is res judicata while the Fourth Circuit considers the issue to be solely one of collateral estoppel. Assuming that the "federal law" of res judicata would be similar to Georgia law, there is now an additional conflict between the (former) Fifth and the Fourth Circuit.

IV. WAIVER AND THE FAILURE OF THE FOURTH CIRCUIT TO CONSIDER THE FINDING OF THE STATE COURT THAT THE SEARCH PROVIDED THE FACTUAL BASIS FOR THE PLEA.

The Fourth Circuit, and *Prosise* in his opposition brief, stated that no circuit court has applied waiver to any case other than a subsequent habeas corpus action. This is not correct. *See, United States v. $31,697.59 Cash,* 665 F.2d 903 (9th Cir. 1982) (plea of guilty is waiver of right to raise issue in subsequent forfeiture proceeding), *Cramer v. Crutchfield,* 648 F.2d 943 (4th Cir. 1981) (per curiam) (failure to raise constitutional issue at a trial is a waiver of right to pursue issue in subsequent 1983 action), *Larios-Mendez v. Immigration and Naturalization Service,* 597 F.2d 144 (9th Cir. 1979) (plea of guilty is waiver of right to raise constitutional issues in subsequent deportation proceedings).

Prosise argues that the Fourth Circuit did not overlook the express finding of the state court that the search and seizure was the very basis of

the conviction "but rather, rejected such an analysis in favor of a general rule of non-preclusion." Prosise goes on to say that the Fourth Circuit simply "rejected the factual basis of the plea as a useful way of determining the preclusive effect to be given his plea." Respondent's brief at pp. 10-11.

The petitioners have argued in this Court that had the Fourth Circuit examined the record in the state court, it would not have adopted a "flat-rule" of non-preclusion for search and seizure issues in guilty plea cases. Prosise takes the position at page 11 of his brief that the Fourth Circuit was fully aware of the record but found a review of the state court record not to be a "useful way of determining the preclusive effect to be given his plea." But even if one assumes that the Fourth Circuit did examine the record closely and did fully appreciate the ease with which one could see the importance the search played in Prosise's criminal case (and hence incentive to litigate), then there is even less logic to the following conclusion:

> "The question [of incentive to litigate in a guilty plea case] is so likely to be one incapable of fair and expeditious resolution in the run of § 1983 actions that we believe a rule of non-pre-

> clusion should obtain with respect to search and seizure issues in guilty plea cases." *Prosise, supra* at 1142.

Such an inflexible rule promotes no discernable judicial concerns and certainly is not compatible with the Virginia Court's view that preclusion will apply in "appropriate circumstances." Such a rule will surely increase the workload of the federal courts by requiring the full litigation of search and seizure claims in instances where any court would easily find them to have been claims crucial to the conviction and clearly demonstrating that the criminal had incentive to litigate "to the hilt."

CONCLUSION

The Fourth Circuit has adopted an inflexible rule of non-preclusion in guilty plea cases. The circuit court states that the "more important" reason behind its rule of non-preclusion is its belief that since *Stone v. Powell*, 428 U.S. 465 (1976), the "§1983 federal forum is now the only one available for the assertion of this particular constitutional claim." *Prosise, supra* at 1142. This kind of reasoning can be characterized as an implicit distrust of the state court system; it shows a continued belief that every person must have at least one opportunity to pursue consti-

tutional issues in federal courts. This rule is directly at odds with the principles set out in *Allen v. McCurry, supra, Stone v. Powell, supra,* and *Tollet v. Henderson,* 411 U.S. 258 (1973).

The *Prosise* case involves a very simple and clear record, and the issue presented is significant and currently subject to conflicting views in the Circuit Courts. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Counsel for Petitioners

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Counsel of Record and
Counsel for Petitioners

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 16th day of April, 1975.

The petition of Guthrie E. Souders for a writ of error to a judgment rendered by the Circuit Court of Arlington County on the 18th day of July, 1974, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Edward Gabrielson and others were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Testee: HOWARD G. TURNER
CLERK

By: /s/ ALLEN L. LUCY
DEPUTY CLERK

VIRGINIA:

IN THE CIRCUIT COURT OF
ARLINGTON COUNTY

AT LAW NO. 15840

[Recorded July 18, 1974]

GUTHRIE E. SOUDERS,

Plaintiff,

v.

EDWARD GABRIELSON, et al.,

Defendants.

O R D E R

This cause came on to be heard on the 10th day of June, 1974, on the Plea of Estoppel and Res Adjudicata filed by the defendants, Edward Gabrielson, Daniel Hartle, Stewart Pell and Harry Parr; and

The Court having considered the legal authorities presented by counsel, having taken testimony with relation to said Plea, having heard the argument of counsel and being of the opinion that said Plea should be sustained,

It is accordingly ORDERED and ADJUDGED that the Plea of Estoppel and Res Adjudicata filed

by the defendants, Edward Gabrielson, Daniel Hartle, Stewart Pell and Harry Parr, be and the same hereby is sustained.

It is further ORDERED that this action be and the same hereby is dismissed with prejudice, to which ruling of the Court the plaintiff, by counsel, duly excepted.

THIS ORDER IS FINAL.

ENTERED: July 18th, 1974

/s/ Charles S. Russell
Judge

SEEN:

SIMMONDS, COLEBURN, TOWNER & CARMAN

By /s/ George C. Towner, Jr.
Counsel for Defendants

/s/ Charles G. Flinn
Counsel for Defendants

SEEN AND OBJECTED TO:

/s/ Raymond D. Clark
Counsel for Plaintiff

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF ARLINGTON

AT LAW NO. 15840

[Filed August 16, 1974]

GUTHRIE E. SOUDERS,

Plaintiff,

v.

EDWARD GABRIELSON, et al.,

Defendants.

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERRORS

TO: JOSEPH C. GWALTNEY,
CLERK of the Circuit Court for the
County of Arlington, Virginia
Courthouse
Arlington, Virginia 22201

NOTICE is hereby given that the Plaintiff, Guthrie E. Souders, by and through his counsel, Ralph R. Curry, appeals from a final Judgment rendered by this Honorable Court on the 18th day of July, 1974, and announces his intention of applying for a Writ of Error and Superseadeas to the Supreme Court of Virginia.

ASSIGNMENT OF ERRORS

1. The Trial Court erred in its finding and ruling in granting the Plea of Estoppel and Res Adjudicata in its order of July 18, 1974, the same being contrary to the law and the evidence of the case.

2. The Plea of Estoppel and Res Adjudicata was not timely filed, without sufficient advance or reasonable notice, and the evidentuary hearing held thereon was not in compliance with the Pre-Trial Order.

3. The Defendants failed to carry their burden of proof necessary to support the Court's finding and ruling to sustain their Plea of Estoppel and Res Adjudicata.

4. The Evidence was insufficient to support the Court's finding that the arrest was lawful and the Court erred in not allowing the question of facts thereon to be submitted to a jury.

5. The Court erred in finding the Plaintiff's pleadings and evidence did not raise a question of the use of excessive force by the Defendant and further erred in not allowing the facts thereof to be decided by a jury.

6. The Court erred in sustaining the Plea of Estoppel and Res Adjudicata in that the matter

was not determined between the same parties or privies, the issue determined in the prior criminal actions is not the same issues in the instant case, nor was the issues of facts in the instant case proved to have been actually litigated, nor was there proof that the Plaintiff had a full and fair opportunity in the prior criminal action, and the same clearly shows the contrary and that he was without counsel and that the test of mutuality is not applicable in this case, i.e., that both parties are equally bound thereby and if the outcome had been the opposite, that the other party would have been equally bound by the opposite result.

7. The Court erred in its confinement of issues and cross examination by counsel for the Plaintiff.

8. The Court made further error in asserting it was not concerned with the credibility of witnesses.

9. The Court erred in its finding that he was convicted of the offense for which the Defendants went to arrest him in that the same is irrelevant, immaterial and prejudicial to the Plaintiff on the issues, law and facts of the instant case.

10. The Court further erred in making a finding that the sobriety of the Plaintiff at the

time of the alleged arrest was not an essential element of probable cause.

11. The plea of guilty entered in the County Court, made without representation of counsel, does not support in the record that no one sought to imprison him in those cases.

STATEMENT

It is the intention of counsel for the Plaintiff to file hereafter transcripts, statements of fact, testimony, and other incidents of this case.

GUTHRIE E. SOUDERS

By: /s/ Ralph R. Curry
Counsel

/s/ Ralph R. Curry
Counsel for Plaintiff
2030 - 16th Street, North
Arlington, Virginia 22201

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 1974, I delivered a copy of the foregoing NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR, by hand, to George C. Towner, Jr., Esquire, counsel for Defendants, and to Charles G. Flinn, Esquire, Assistant County Attorney.

/s/ Ralph C. Curry

VIRGINIA:

IN THE CIRCUIT COURT OF
ARLINGTON COUNTY

AT LAW NO. 15840

GUTHRIE E. SOUDERS,

Plaintiff,

v.

EDWARD GABRIELSON, et al.,

Defendants.

PLEA OF ESTOPPEL AND
RES ADJUDICATA

Come now the defendants and file herein their Plea of Estoppel and Res Adjudicata and move the Court to dismiss this action filed herein against them and as their grounds therefor state as follows:

1. That on August 31, 1970, the plaintiff, Guthrie Eugene Souders, did plead guilty to and was found guilty of unlawfully and against the peace and dignity of the Commonwealth of committing an assault and battery upon the person of Officer Gabrielson, No. 336, on August 24, 1970, in the County Court of Arlington County, the same being T-83887, a copy of which is attached hereto and made a part hereof.

2. That on August 31, 1970, the plaintiff, Guthrie Eugene Souders, did plead guilty to and was upon the complaint of Officer Gabrielson found guilty of unlawfully and against the peace and dignity of the Commonwealth being drunk in a public place on August 24, 1970, in violation of the County Ordinance, in the County Court of Arlington County, the same being T-83886, a copy of which is attached hereto and made a part hereof.

3. That having pled guilty and having been found guilty of the charges as set forth above, the judgment of the County Court of Arlington County is binding upon the plaintiff in this proceeding and the plaintiff is precluded from reopening in this action the issues determined in that case and as such the findings of the County Court of Arlington County are conclusive upon the plaintiff.

4. That since this action arises from the arrest of the plaintiff on the charge of being drunk in public and the plaintiff's assault upon Officer Gabrielson and since the plaintiff has heretofore admitted being guilty to both of the charges, the plaintiff is estopped in this action from pursuing a claim against Officer Gabrielson and the other defendants arising from the plaintiff's own unlawful conduct.

WHEREFORE, these defendants pray that this action against them be dismissed with prejudice and that they be awarded judgment for the costs on their behalf expended.

EDWARD GABRIELSON, DANIEL HARTLE, STEWART PELL and HARRY PARR, Defendants

By /s/ George C. Towner, Jr.
Counsel

SIMMONDS, COLEBURN, TOWNER & CARMAN

By /s/ George C. Towner, Jr.
Counsel for Defendants

Certificate of Service

I hereby certify that a copy of the foregoing was delivered to Raymond D. Clark, Esquire, counsel for the plaintiff, this 7th day of June, 1974.

/s/ George C. Towner, Jr.

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Office - Supreme Court, U.S.
FILED
NOV 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2169

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

GILBERT A. HARING, Lieutenant,
Arlington County Police Department;

HENRY W. ALLEN, Detective;

J. R. BADEY, Detective;

ALVIN BEUCHERT, Officer;

THOMAS TRUMBLE, Officer;

STANLEY GARBER, Officer,

Petitioners,

vs.

JOHN FRANKLIN PROSISE,

Respondent.

On Writ Of Certiorari to the United States
Court of Appeals for the Fourth Circuit

PETITIONERS' BRIEF

CHARLES G. FLINN
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Counsel for Petitioners

QUESTIONS PRESENTED

Can a person who has pleaded guilty in a state criminal court to manufacturing illegal drugs, and who did not raise the validity of the search that produced the essential evidence of the crime, subsequently bring an action in a federal court under 42 U.S.C. § 1983 claiming that the search was unconstitutional?

a. By pleading guilty in a state criminal court, does a person waive any right to litigate in a § 1983 action the constitutionality of the search which produced the essential evidence of the crime?

b. Does a conviction based upon a plea of guilty collaterally estop the later litigation in a federal court § 1983 action of the search and seizure claim, where the state court expressly found a sufficient factual basis for the plea and that basis was the evidence produced by the search?

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No. 81-2169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GILBERT A. HARING, Lieutenant,
Arlington County Police Department;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHERT, Officer;
THOMAS TRUMBLE, Officer;
STANLEY GARBER, Officer,

Petitioners,

vs.

JOHN FRANKLIN PROSISE,

Respondent.

On Writ Of Certiorari to the United States
Court of Appeals for the Fourth Circuit

PETITIONERS' BRIEF

OPINIONS BELOW

The opinion of the United States Court of Appeals For the Fourth Circuit is now reported at 667 F.2d 1133 (4th Cir. 1981), and it is found in the Joint Appendix at pp. 57 through 84. The opinion of the Honorable Albert V. Bryan, Jr. in the United States District Court is unpublished but

is also found in the Joint Appendix at pp. 46 through 56.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A panel of the Fourth Circuit Court of Appeals entered its judgment on December 30, 1981. J.A. at p. 85. A timely petition for rehearing en banc was filed on January 13, 1981, by the petitioners ("police officers"). On March 19, 1982, the petition for rehearing was denied by the panel and the suggestion of a rehearing en banc was denied by an evenly divided court; a poll was taken, and Judges Russell, Widener, Hall, Murnaghan and Chapman voted in favor of a rehearing en banc. J.A. at p. 86. 28 U.S.C. § 1254 (1) is believed to confer jurisdiction on this Court to review the judgment of the Fourth Circuit by a writ of certiorari. The circuit court stayed its mandate pending the application for a writ of certiorari. J.A. at pp. 88 and 90. This Court granted the writ of certiorari on October 12, 1982.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment IV, which provides:

> "The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment XIV, Section 1, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, which provides:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1738 which provides in part:

> "Such Acts, records and judicial proceeding, [of a state] or copies thereof, so authenticated shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

The respondent (Prosise) filed a *pro se* action in the United States District Court for the Eastern District of Virginia claiming that the police officers violated his Fourth and Fourteenth Amendment rights while acting under color of law. Prosise alleged that, pursuant to a warrant, the officers illegally searched and seized certain items in his apartment. The action was based

upon 42 U.S.C. § 1983, and the district court took jurisdiction of the case apparently pursuant to 28 U.S.C. § 1343.

On the day of the search,[1] the officers had earlier responded to a radio call about a domestic disturbance in an apartment occupied by Prosise and his fiancee, Katherine Denny. After the officers arrived, but before they could gain entry, guns were fired in the apartment. As a result of their investigation, Prosise was arrested at the scene for attempting to kill Denny.

Denny stated to the arresting officers that Prosise was "making PCP" (or "angel dust") and she showed them a baggie she said contained PCP and a closet where there were various chemicals and devices. Henry Allen, a narcotics detective, was called to the apartment. He examined the closet, noticed a smell of ether, performed a field test, and concluded that these were chemicals and devices used to make PCP. He then went to a magistrate and obtained a warrant which authorized a search of the entire apartment to find

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[1]These facts are drawn from the opinion of the Fourth Circuit. *Prosise v. Haring*, 667 F.2d 1133, 1134-35 (4th Cir. 1981). They were also set out in the affidavits of the officers in support of their motions to dismiss and for summary judgment and in the particular pleadings and exhibits referred to in the text.

PCP. The affidavit he executed in support of the search is found in the Joint Appendix at pp. 23 through 25. The apartment was searched and the chemicals, apparatus, and receipts showing the purchase of certain chemicals used in the manufacturing of PCP were seized. The chemicals were submitted for expert analysis.

Prosise was later charged with possession of PCP and manufacturing PCP. Prosise entered into a plea agreement whereby the charge of possession was nol-prossed in return for a guilty plea to manufacturing PCP. The plea agreement can be found at pp. 26 through 28 of the Joint Appendix.

A hearing was held in the Arlington County Circuit Court by Judge Charles S. Russell at which Detective Allen took the stand and testified at length about why the search mentioned above was made, what was seized, and the results of the experts' chemical analysis. These pages from the state court transcript are found in the Joint Appendix at pp. 29 through 42. After hearing the details of the search and seizure, the following exchange took place (this exchange was not mentioned in the Fourth Circuit opinion):

> "The Court: Does the Commonwealth have any further evidence?

"Mr. Melson [Deputy Commonwealth's Attorney]: No, sir.

"The Court: Does the defense wish to present any evidence?

"Mr. Rodway [Defendant's attorney]: No, sir.

"The Court: The court finds the plea of guilty to be voluntarily and intelligently tendered *and finds there is a sufficient factual basis; and upon the evidence heard this morning, the court finds the defendant guilty of the manufacture of phencyclidine as charged in the indictment C-12689."* Emphasis added. J.A. 41.

Prosise was sentenced to twenty-five years imprisonment and this conviction is final. J.A. 44. (This was later reduced to twelve years.) Prosise then filed this action for damages in the district court under 42 U.S.C. § 1983 claiming that the search (which provided the factual basis for the conviction) was illegal.[2]

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[2]The district court characterized Prosise's Fourth and Fourteenth Amendment claim in the following way:

(footnote continued)

In support of their motions to dismiss and for summary judgment (J.A. at pp. 20 through 22), the officers provided among other things the plea agreement and the transcript of the hearing where Prosise pleaded guilty. The district court granted the officers summary judgment.

(footnote continues)

> "In his second claim plaintiff attacks the validity of the search warrant obtained by the defendants to authorize the search of plaintiff's apartment. In his complaint plaintiff stated that the search warrant obtained to seize chemicals and devices used to manufacture phencyclidine (PCP) contained "false information" that was used to "set up" the plaintiff. In an attempt at explanation plaintiff asserted that the search warrant was directed at chemicals in the living room whereas in reality they were located in the closet; he further contended that the officers who executed the warrant (defendants Allen and Badey) emptied out some of the contents of the chemical bottles in order to create the appearance of use by the plaintiff. He further charges officers Allen and Badey with seizing chemicals that were not authorized to be seized in the warrant and with moving chemicals around so that they would appear in plain view. Finally, plaintiff maintains that Officer Beuchert exceeded the scope of the search warrant by seizing drugs out of a shirt located in the bathroom." J.A. at pp. 48 through 49.

The district court chose to base its grant of summary judgment on the search and seizure issues upon collateral estoppel and waiver principles.[3] It reasoned that "the plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful." J.A. 52. Further, the court concluded that the "reasoning undergirding" this Court's decision in *Tollet* v. *Henderson,* 411 U.S. 258 (1973), precluded Prosise's assertion of the Fourth Amendment claim in this § 1983 action.[4] J.A. at 55. Judge Bryan stated:

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[3]The district court also concluded that it was convinced on the merits that the search and seizure was lawful. J.A. at p. 49. However, it further reasoned that the basis for the grant of summary judgment should be on estoppel grounds rather than on the merits. J.A. at p. 50.

[4]The district court reached its decision before this Court decided *Allen v. McCurry,* 449 U.S. 90 (1980) (collateral estoppel applicable in a subsequent § 1983 action involving a search and seizure). Thus at the time of Judge Bryan's decision, the Fourth Circuit's position on the general issue of estoppel in § 1983 actions involving prior state court criminal convictions was *Rimmer v. Fayetteville Police Department,* 567 F.2d 273 (4th Cir. 1977). *Rimmer* concerned the "actual litigation" of a Sixth Amendment issue in the prior state proceeding and generally embraced the position that collateral estoppel only applies to issues which can be presented in a federal habeas corpus proceeding; this assured a person at least one opportunity to have a federal court review the constitutional issue. This Court in *Allen v. McCurry* rejected this aspect of the *Rimmer* decision.

> "If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*." J.A. at p. 55.

Prosise appealed the grant of summary judgment to the Fourth Circuit, and that court's decision was rendered on December 30, 1981. The panel reversed the district court and held that Prosise was not barred by his guilty plea from litigating the validity of the search even though it produced the evidence essential to his conviction. The Fourth Circuit in *Prosise* adopted a "flat-rule of nonpreclusion" in § 1983 cases involving guilty pleas for essentially two reasons. First, it concluded that the court in the collateral proceeding would likely be unable to determine fairly and expeditiously in "the run of § 1983 actions" if the criminal defendant had adequate "incentive" to litigate the constitutional issue in the state court; on the balance, the *Prosise* court said, "the game is not worth the candle." *Prosise, supra* at 1142. Second, and more important, because of *Stone v. Powell*, 428 U.S. 465 (1976), "the federal 1983

forum is now the only one available for the assertion of this particular constitutional claim." *Prosise, supra* at 1142.

A petition for rehearing en banc was made. It was argued that the panel's decision overlooked material facts and law, and that a conflict had been created possibly within the Fourth Circuit and definitely between the Tenth and Fourth Circuits.

On March 19th, the panel denied the petition for rehearing, and by an evenly divided court the request for rehearing en banc was also denied. A poll was taken and Judges Russell, Widener, Hall, Murnaghan and Chapman would have granted the rehearing. On March 29, 1982, and again on April 28, 1982, the Fourth Circuit entered an order which stayed the mandate of the circuit court for thirty days, pending application of the officers in the Supreme Court of the United States for a writ of certiorari to the circuit court. On October 12, 1982, this Court entered an order granting the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

This Court and the Virginia Supreme Court have established the principle that a guilty plea essentially waives the right to later seek one's freedom after conviction based on evidence gath-

ered through an alleged Fourth Amendment violation. The result of the circuit court's *Prosise* decision is that the same person can nonetheless seek money damages under § 1983. Prosise had a "full and fair opportunity" to litigate the search and seizure in state court, but he voluntarily chose to forego it when he entered into a plea agreement. This waiver must be judicially enforced to avoid attacks on otherwise final state criminal convictions. To hold otherwise, as the circuit court did, will allow a state criminal defendant to plead guilty under favorable terms and conditions and then to "forum shop" by going to federal court to raise constitutional claims.

Although the Fourth Circuit established in *Cramer v. Crutchfield*, 648 F.2d 943 (1981) (per curiam), that it will apply waiver or preclusion to unlitigated Fourth Amendment claims where a state criminal trial took place, it has denied similar effect in a case like this where there is guilty plea. The Fourth Circuit decision in *Prosise* is also in conflict with that of the Tenth Circuit in the same matter. *Metros v. United States District Court*, 441 F.2d 313 (1971). The reasoning of *Prosise* decision also conflicts with the principles underlying decisions by the First and Ninth Circuit, for example, in related cases involving unlitigated legal claims and guilty pleas.

More recently, the Fifth Circuit in *Southern Jam, Inc. v. Robinson*, 675 F.2d 94 (1982), held that under the principles of *res judicata* the failure to attack the constitutionality of an ordinance in a state court prosecution precluded the litigation of the ordinance's validity in a later § 1983 action. The result in *Prosise* conflicts with the result in the *Southern Jam* case.

Finally, the *Prosise* decision is at odds with the principles established by this Court in *Tollett v. Henderson*, 411 U.S. 258 (1973) (plea of guilty waives all antecedent constitutional objections), and *Stone v. Powell*, 428 U.S. 465 (1976) (no right to litigate Fourth Amendment issue in federal court by *habeas corpus* if full and fair opportunity to litigate issue given in state court).

Prosise's § 1983 action should be precluded by principles of collateral estoppel and waiver. For all of these reasons, the decision of the Fourth Circuit should be reversed.

ARGUMENT

I. THE DECISION OF THE FOURTH CIRCUIT WILL ENCOURAGE PERSONS CONVICTED ON GUILTY PLEAS TO LITIGATE CLAIMS OF UNLAWFUL SEARCH AND SEIZURE AND TO CHALLENGE THEIR STATE COURT CONVICTIONS THROUGH § 1983 ACTIONS EVEN THOUGH THE SEARCH WHICH PRODUCED THE EVIDENCE WAS THE BASIS FOR THEIR CONVICTION.

The Fourth Circuit's primary reason for its "flat-rule of non-preclusion" in § 1983 actions of issues which were not actually litigated during guilty plea hearings in state court, was that after *Stone v. Powell, supra*, the "§ 1983 federal forum is the only one available for assertion of this particular constitutional claim." *Prosise, supra* at 1142. Although the circuit court recognized that the decision of *Allen v. McCurry*, 449 U.S. 90, 105 (1980), rejected this reason as a sufficient basis for a "blanket rejection of collateral estoppel in § 1983 actions involving Fourth Amendment claims," the circuit court found it nonetheless a legitimate reason "well within conventional doctrine." *Prosise, supra* at 1142. As discussed further below, there is no basis for concluding that there is a greater need to have federal review of Fourth Amendment claims arising in state courts in guilty plea cases than when such claims arise during a state court trial.

This Court is fully aware of the rising amount of § 1983 litigation in the federal courts. The statistics presented in the brief of Amici Curiae show this. The officers respectfully suggest that this kind of litigation will increase if prisoners and other convicted persons are able to seek damages for Fourth Amendment claims when they have pleaded guilty, and in particular even when the evidence produced by the search in issue in the later 1983 action was essential to the conviction.

There are strong public policy interests which require that Prosise's § 1983 action be precluded. First, by holding that waiver or estoppel precludes Prosise's 1983 action, this Court would prevent the creation of a new method by which defendants can indirectly attack the validity of their guilty pleas in state courts.[5]

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[5]Although a person who has pleaded guilty cannot obtain his freedom in a habeas corpus proceeding by raising a search and seizure that resulted in his conviction, he will be able to seek money damages from the officers involved. The quantum of damage should not include compensation for time spent in jail since the incarceration was caused by the commission of the crime. However, it will no doubt be argued that people like Mr. Prosise should be able to seek compensation for time spent in jail since the fruits of the search in question in effect put them there. This Court should not permit convicted persons to recover damages for their incarceration under these circumstances.

There should be finality of judgment, cessation of litigation and a respect for the state court's ability to resolve constitutional issues. To accomplish this, the guilty plea should be given full force and effect. To hold otherwise will disrupt the comity between federal and state courts,

A very important consideration is that a defendant who pleads guilty should not be entitled to greater federal protection than the criminal defendant who fully and fairly litigates constitutional issues in the state court system. As this Court said in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975):

> "A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. *McMann v. Richardson, supra*, at 768, 25 L.Ed.2d 763. Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Lefkowitz v. Newsome, supra*, 420 U.S. at 289.

The criminal defendant who deliberately refuses to follow the orderly procedure for litigating constitutional claims in order to accept the benefits of a guilty plea should not be entitled to the added benefit of unencumbered access to a federal forum.[6] To reward those defendants who plead guilty would create a disincentive to the assertion, and full and fair litigation, of all constitutional claims in the state system.

ARGUMENT II

II. 28 U.S.C. § 1738 ALLOWS THE PRECLUSION OF PROSISE'S § 1983 ACTION.

This Court need not reach the question of precisely how 28 U.S.C. § 1738 would work in a case where the state's law would *deny* preclusive effect to a guilty plea.[7] The petitioners discuss this point here because Prosise has argued that

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[6]Petitioners are aware of the case of *Jordan v. United States* (and certain state defendants), Civil No. 8-750 PNX WPC now pending the United States District Court for Arizona where the 1983 plaintiffs are attempting to pursue Fourth Amendment claims after pleading guilty in state court.

[7]The *Prosise* circuit court admitted, the "exact operation of § 1738 and its relationship to the general policies of *res judicata* in the § 1983 context is not wholly clear." *Prosise v. Haring*, 667 F.2d 1133, fn. 4, 1138 (4th Cir. 1981). The *Prosise* court went on to note that a divergence of views exist "among both courts and commen-

(footnote continued)

Virginia law would not preclude Prosise's civil action. Although Virginia law is not settled on this point, the law in Virginia which does exist indicates a Virginia court would not permit Prosise's civil damage action.[8] What Prosise would have this Court believe is that the very same Virginia court which found that the search provided the factual basis for the conviction would allow Prosise to attack that conviction by claiming the search was unconstitutional.

(footnote continues)

tators." *Id.* Serious problems of uniformity in the federal circuits would result if every state's rule of collateral estoppel were automatically followed because of the differences in the states' law. This Court may have answered some of these concerns in *Kremer v. Chemical Construction Corp.*, ___ U.S. ___, 102 S.Ct. 1883 (1982). (§ 1738 requires federal court to use *res judicata* rule of state court which has effect of precluding Title VII federal action.)

[8]In adopting a flat-rule of non-preclusion as to unlitigated issues in guilty plea cases, the Fourth Circuit said such a rule "is conformable under 28 U.S.C. § 1738 to Virginia decisions respecting the preclusive effect of its criminal judgments." *Prosise, supra* at 1142. If this is meant to imply that Virginia would deny preclusive effect to Prosise's guilty plea in these circumstances, the petitioners would argue that such a conclusion is without support. See the text above. Petitioners interpret the Fourth Circuit's statement as simply recognizing the fact that the Virginia Supreme Court has not had an occasion to issue a published opinion on the specific issues presented in *Prosise*.

The Virginia Supreme Court held in *Eagle, Etc. Insurance Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927), that it would, given adequate justification, invoke collateral estoppel despite the usual rule of mutuality. Estoppel was used defensively in the *Eagle v. Heller* case, when a convicted arsonist tried to recover on a fire insurance policy on the very house he burned.

More recently the court indicated in *Luke Construction Company v. Simpkins*, 223 Va. 387, 291 S.E.2d 204 (1982) (per curiam), that there are circumstances other than that of the *Eagle v. Heller* case where it would apply collateral estoppel despite the lack of mutuality. Hence, *Eagle v. Heller, supra*, does not represent a "single limited exception to this general rule of non-preclusion...."[9] Although Prosise argues in his Opposition Brief that Virginia's law of estoppel only

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[9]Prosise's argument that there was other "evidence independent of the search" (Opposition brief at page 8) that could have supported the plea cannot be taken seriously. Prosise provides no citation to any part of the record which would tend to support such a claim. The claim is directly contrary to the state court's express finding that the factual basis of the plea of guilty was the evidence produced by the search (J.A. at p. 41) and ignores the difficult burden on the prosecution to prove the act of manufacturing drugs. The chemicals, apparatus and experts' analysis of the chemicals would be needed to convict.

applies to issues "actually litigated" and thus would never apply to a guilty plea situation, Virginia has never issued a published opinion on what issues, if any, might be necessarily decided by a guilty plea.[10] If one assumes that Virginia would be inclined to follow the "conventional" estoppel doctrine then one would expect Virginia to apply estoppel in at least some cases involving guilty pleas; even the *Prosise* court admits that the "conventional - or at least plainly emerging" doctrine of estoppel would provide preclusive effect after a guilty plea to the elements of the crime. *Prosise, supra* at 1140; see also *Ideal*

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[10]The officers have found one unpublished case where the Virginia Supreme Court has considered the preclusive effect of a guilty plea. In *Souders v. Gabrielson, et al.*, Record No. 741124, the Virginia Supreme Court denied a writ of error to a July 18, 1974, judgment of Charles S. Russell of the Arlington County Circuit Court (Law No. 15840). Judge Russell is now a member of the Virginia Supreme Court. The circuit court held that the civil plaintiff's prior plea of guilty to drunk in public and assault and battery of the arresting officers precluded the plaintiff's subsequent damage action against the arresting officers for unlawful use of force. The Virginia Supreme Court said that it reviewed the record in the circuit court and found "no reversible error." See the appendix to the Reply Brief for the plea of estoppel and res judicata, the circuit court's order sustaining the plea of *res judicata* and estoppel, the notice of appeal and assignments of error and the Virginia Supreme Court's denial of the writ of error.

Mutual Insurance Co. v. Winker, 319 N.W.2d 289 (Iowa S.Ct. 1982) (reversing earlier decisions, the court embraced issue preclusion as applicable to elements of the criminal conviction based on a guilty plea).

There are two additional elements present in *Prosise* which distinguish it from those Virginia cases mentioned by the Fourth Circuit as being recent statements of Virginia law of collateral estoppel. See, e.g., *Aetna Casualty & Surety Co. v. Czonka*, 200 Va. 385, 105 S.E.2d 869 (1958), as referred to in *Prosise* at 1139.

The first element in *Prosise* is the substantial identity of the parties in the criminal prosecution and in the subsequent § 1983 action. See *Moran v. Mitchell*, 354 F.Supp. 36 (E.D. Va. 1973). (The police officers who were sued in a 1983 action were deemed to be the same parties in earlier state court prosecution because of the identity of interest between the state and its police.) The second element is that the "causes of actions" in the two proceedings are also substantially the same. According to the Virginia Supreme Court the scope of "cause of action" varies "with its context and is broadly characterized as an assertion of particular legal rights which have arisen out of a definable factual

transaction." *Bates v. Devers*, 214 Va. 667, n. 8, 672, 202 S.E.2d 917, at n. 8, 921 (1974).

The presence of these elements suggests that Virginia would apply the broader doctrine of *res judicata*. In a similar situation, the Fifth Circuit recently examined the effect of *Allen v. McMurry* and concluded that "as long as the parties had a full and fair opportunity to litigate their constitutional allegations in the prior state court proceedings [citation omitted], the defense of *res judicata* is viable in a subsequent § 1983 action." *Southern Jam, Inc. v. Robinson*, 675 F.2d 94, 97 (5th Cir. 1982). In *Southern Jam*, the circuit court applied Georgia law. Because the 1983 plaintiff had failed to raise any constitutional objections to an ordinance in a prior state court enforcement proceeding against the plaintiff, the plaintiff was barred by *res judicata* from raising the constitutional issues in the 1983 action.

The doctrine of *res judicata* applied in the *Southern Jam* case, is also applicable to the *Prosise* case. Virginia, like Georgia, also follows the rule that *res judicata* bars the subsequent litigation of all claims that were or could have been litigated in an earlier action between the same parties provided the claims arise from the same "cause of action."

Unfortunately there has been no authoritive determination by Virginia of the precise effects of collateral estoppel and waiver[11] after a guilty plea. Because of this, § 1738 allows this Court to establish a rule of preclusion to be applied in the federal courts in such circumstances. Using existing Virginia law and recent case law developments elsewhere as a guide, it appears that the Virginia Supreme Court would give preclusive effect to Prosise's guilty plea. This Court would not be denying full faith and credit to Prosise's conviction if the Court chose to give it preclusive effect as to issues raised in Prosise's § 1983 action in federal court.

III. THE PANEL FAILED TO CONSIDER THE EXPRESS FINDING BY THE STATE COURT THAT THE SEARCH AND SEIZURE WAS THE BASIS OF THE CONVICTION AND IT GAVE PRIMARY IMPORTANCE TO THE LACK OF A FEDERAL FORUM FOR THE § 1983 CLAIM.

The lengthy testimony about the search and seizure and the express finding by the state trial court that the facts revealed by the search and seizure formed the basis of the finding of guilt are

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[11]The Fourth Circuit rejected the use of the doctrine of waiver simply on the grounds it was only applicable to subsequent *habeas corpus* proceedings. *Prosise, supra* at 1136-37. The court did not discuss the question of whether Virginia would apply the principles of waiver to the case at bar. Virginia law is clear that a guilty plea in a criminal case waives the right to contest all but jurisdictional issues. See *Kibert v. Commonwealth*, 216 Va. 660, 664, 222 S.E.2d 790, 793 (1976).

the most important facts in the case at bar. These facts are not mentioned in the Fourth Circuit's opinion. Rather than restrict its decision to cases such as the instant one, where the state court record makes it abundantly clear which issues were and were not necessarily decided by the guilty plea, the panel lumps all guilty pleas together.

It is difficult to understand how the Fourth Circuit reached its conclusion that in guilty plea cases it is likely that one could not determine fairly and expeditiously whether a criminal defendant had adequate "incentive" to make a suppression motion. For example, the Fourth Circuit admits in the preceding sentence that "the question could always be resolved in the usual processes, many times fairly and occasionally even rather easily...." *Prosise, supra* at 1141-42.

If Prosise with the aid of his counsel had any reasonable belief that the search was illegal, then Prosise had adequate incentive to contest the search. He chose not to do so even though at stake was up to forty years imprisonment. See Va. Code Ann. § 18.2-268. There is no doubt but that Prosise's conviction for manufacturing PCP could not have been obtained without the chemicals, devices, receipts of purchases of chemicals, and experts' analyses of this seized evidence in this case.

The Fourth Circuit assumes, without any basis, that in most all guilty plea situations there is likely to be some incentive *not* to make a suppression motion or that some injustice occurred in the state court. Underlying the Fourth Circuit's decision in *Prosise* is an implicit distrust of the state court system. This distrust is evident at page 1142 of its opinion where the court states that the "more important" reason for adopting a general rule of non-preclusion is that the "§ 1983 federal forum is the only one available for assertion of this particular claim." *Prosise, supra* at 1142. In essence, the circuit court has ignored *Stone v. Powell, supra,* and *Allen v. McCurry, supra.*

In *Stone v. Powell,* the Court held that Fourth Amendment claims which were capable of being fully and fairly litigated in state court could not be reasserted in federal *habeas corpus* proceedings. Some courts construed *Stone v. Powell* to make collateral estoppel inapplicable to § 1983 actions involving Fourth Amendment claims based on a general belief that there must be at least one unencumbered right to litigate such an issue in a federal court. See *McCurry v. Allen,* 606 F.2d 795 (8th Cir. 1979).

But this reasoning was flatly rejected by the Court in *Allen v. McCurry, supra*. The Court in *McCurry* said that preclusion cannot be denied a state court judgment out of a distrust of the ability of state courts to correctly decide constitutional issues. Section 1983 is now the only hope of pursuing this particular claim because Prosise voluntarily chose not to assert the claim in the state court. As the *McCurry* Court said, there is no principle whereby a person has a universal right to litigate a constitutional claim in federal court, and the error of the panel's opinion is that it seeks to create such a right. *McCurry* at 105. Moreover, there is nothing in the legislative history of § 1983 which indicates that Congress intended to deny binding effect to a state court judgment when the parties had a full and fair opportunity to be heard. *McCurry* at 104.

Prosise argued in his Opposition that the Fourth Circuit did not overlook the express finding of the state court that the search and seizure was the very basis of the conviction "but rather, rejected such an analysis in favor of a general rule of non-preclusion." Prosise went on to say that the Fourth Circuit simply "rejected the factual basis of the plea as a useful way of determining the preclusive affect to be given his plea." Respondent's Opposition brief at pp. 10-11.

A court which examined the record in the state court would not have adopted a "flat-rule" of non-preclusion for search and seizure issues in guilty plea cases. If a court did examine the record closely in the case, it would fully appreciate the ease with which one could see the importance the search played in Prosise's criminal case (and hence incentive to litigate). Thus there is less logic to the following conclusion:

> ."The question [of incentive to litigate in a guilty plea case] is so likely to be one incapable of fair and expeditious resolution in the run of § 1983 actions that we believe a rule of non-preclusion should obtain with respect to search and seizure issues in guilty plea cases." *Prosise, supra* at 1142.

Such an inflexible rule deals with no discernable judicial concerns and certainly is not compatible with the Virginia Court's view that preclusion will apply in "appropriate circumstances." Such a rule will surely increase the workload of the federal courts by requiring the full litigation of illegal search and seizure claims in instances where any court would easily find that the fruits of the searches were crucial to the conviction and clearly satisfy itself that the criminal had incentive to litigate "to the hilt."

A. PROSISE'S GUILTY PLEA IN STATE COURT WAIVED HIS RIGHT TO ALLEGE A CONSTITUTIONAL VIOLATION IN A SUBSEQUENT 1983 ACTION.

It is a well settled principle of federal law that a criminal defendant who pleads guilty waives the right to raise antecedent constitutional objections in subsequent proceedings. *Tollett v. Henderson,* 411 U.S. 258 (1973). This is also the rule in Virginia. *Kibert v. Commonwealth,* 216 Va. 660, 664, 222 S.E.2d 943 (1976). As this Court stated in *Tollett:*

> "We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea...." 411 U.S. at 267.

The issue in *Prosise* is whether this principle of waiver should apply to a Fourth Amendment claim which could not be brought in a *habeas* petition but is brought in a § 1983 action.

The district court approached the *Prosise* case in this manner. It noted that under *Menna v. New York,* 423 U.S. 61 (1975) (per curiam), a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." J.A. at p. 54. The district court reasoned that great significance must attach to a criminal defendant's decision to plead guilty, and stated:

> "If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*. The Court thus concludes that plaintiff's Fourth Amendment claim cannot be maintained

> in this § 1983 action under the reasoning undergirding the *Tollett* decision." J.A. at p. 55.

The Fourth Circuit in *Prosise* rejected the application of this waiver principle, and said that it applies "only to subsequent *habeas corpus* proceedings challenging the criminal conviction."

The rejection of a waiver principle by the Fourth Circuit in *Prosise* cannot be reconciled with that same court's analysis and holding in *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (per curiam). Cramer filed a Section 1983 action for damages and claimed that a police officer who arrested him for illegally having a radar device had violated Cramer's constitutional rights when the officer searched the cab of Cramer's truck and seized the radar device. Cramer was tried and convicted in state general district court of equipping his vehicle with a radar device in violation of Va. Code § 46.1-198.1. Cramer did not assert in his trial that his Fourth Amendment rights had been violated. The federal district court in *Cramer* dismissed Cramer's 1983 claim of an unconstitutional search and seizure.

The Fourth Circuit affirmed the dismissal and said:

> "But Cramer did not object to the evidence derived from the search or move to suppress it at his trial in the Prince George County District Court. *He therefore waived any challenge to the constitutionality of the search.*" *Cramer, supra,* at 945. Emphasis added.

This same reasoning applies to *Prosise;* like the seizure of the radar device in *Cramer,* the state court record in *Prosise* also showed that the search and seizure of the chemicals, devices, and receipts of drug purchases were essential to Prosise's conviction. Despite this similarity of facts in *Cramer* and *Prosise,* the *Prosise* panel inexplicably states:

> "In *Cramer* it was manifest from the record that the evidence used to convict in the state criminal prosecution was that obtained by the search and seizure which formed the basis for the Section 1983 action. This made equally manifest the Section 1983 plaintiff's 'adequate incentive' to seek its suppression in the state action. *It is precisely because the guilty plea obscures what was manifest in Cramer*

that we hold here against preclusion."

Fn. 15 at 1142. Emphasis added.

But even a casual examination of the record in *Prosise* shows that the search was essential to Prosise's plea and that he had "adequate incentive." The ability of a court to determine the impact of a particular constitutional issue on a conviction and hence the adequacy of the incentive to litigate, would not be substantially more difficult in guilty plea cases than it is where a trial took place. It certainly is not here. The point of distinction advanced by the Fourth Circuit is misconceived.

B. PROSISE'S § 1983 ACTION IS ALSO PRECLUDED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

The *Prosise* court begins with the observation that *McCurry* forbids the application of any collateral estoppel doctrine except a "conventional one," and assumes that the application of preclusion in a guilty plea case is not conventional. *Prosise, supra* at 1137. But the Court in *McCurry* said only that the issue before them concerned an example of the "conventional doctrine." Rather than describing what was or was not "conventional" doctrine or what might obtain in other cases, the Court expressed no opinion and certainly did not forbid the application of collateral estoppel to issues involved in guilty plea cases.

Moreover, the use of issue preclusion in guilty plea cases where the search and seizure issue was essential to the state conviction is not "new" nor is it harsher (or more "stringent") than the preclusion that obtains when a trial took place but the issue was not raised. For example, it was used in 1969 in *Palma v. Powers*, 295 F. Supp. 924 (N.D. Ill.) (because the evidence was essential to conviction, the plaintiff in a Section 1983 action held precluded from relitigating a search and seizure). In 1971 the Tenth Circuit in *Metros v. United States District Court*, 441 F.2d 313, held that the plaintiff in a § 1983 action against officers who searched plaintiff's apartment pursuant to a warrant was precluded from alleging there was no probable cause to support the warrant. The plaintiff had earlier pleaded guilty in state court; the court said that "a guilty plea is conclusive as to all but jurisdictional issues." *Id.* at 317. In 1972, the Seventh Circuit in *Williams v. Liberty*, 461 F.2d 325, expressed its approval of *Palma v. Powers*, and this precise rule of preclusion was applied in *Hooper v. Guthrie*, 390 F. Supp. 1327 (W.D. Pa. 1975). In *Ford v. Manion*, 529 F.Supp. 373 (N.D. N.Y. 1982), the court reached the exact opposite conclusion than did the *Prosise* court after extensive review of *Allen v. McCurry*.

Some courts have applied preclusion to civil actions based on a prior guilty plea where the issue was an element of the offense. See *Fontneau v. United States*, 654 F.2d 8 (lst Cir. 1981) (taxpayer's plea of guilty to tax evasion bars relitigation of issue of fraud when taxpayer brought a late suit for refund); *Brazzell v. Adams*, 493 F.2d 489 (5th Cir. 1974) (§ 1983 action claiming illegal entrapment in an earlier state criminal case was held to be barred).

Guilty pleas have provided the basis for estoppel (or waiver) in other contexts. For example, in *United States v. $31,697.59 Cash*, 665 F.2d 903 (9th Cir. 1982),[12] the court held that defendants who had pleaded guilty to a criminal charge involving filing false reports when bringing monetary instruments into the county were collaterally estopped from trying to stop the forfeiture

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[12]See also, *Larios-Mendez v. Immigration and Naturalization Service*, 597 F.2d 144 (9th Cir. 1979) (person's plea of guilty to a charge of aiding and abetting the illegal entry of aliens would stop the assertion of a Fourth Amendment claim of illegal stop in a subsequent civil deportation proceeding against that same person); and *United States v. One 1973 Dodge Van*, 416 F.Supp. 43, 46 at n. 1 (E.D. Mich. 1976) (car owner's plea of guilty to carrying illegal drugs in his car was a waiver of his right to later contest the constitutionality of his arrest and search of his car in a subsequent forfeiture proceeding).

of the instruments on the grounds their pleas were involuntary under Fed.R.Crim.P. 11(f). The court reasoned that a claimant who "by-passes opportunities to raise a claim in one forum should not be able to raise it in a collateral forum without a showing of any special circumstances." *Id.* at 906.

CONCLUSION

The officers have discussed above how the *Prosise* decision conflicts with decisions of other circuit courts. The fact that a conflict exists is not a reason to decide a case one way or another. But when one examines the points of distinction between the Fourth Circuit and the other courts, it can be seen that the reasoning supporting the *Prosise* decision is not persuasive. The Fourth Circuit is in error when it says that a court would likely be unable to fairly and expiditiously determine in most § 1983 actions if there was adequate incentive to litigate the issues in the criminal case. The task is not significantly more difficult where a trial has taken place (see *Cramer v. Crutchfield, supra*) or where the trial court must determine if the issue in the § 1983 action was an "element" of the criminal conviction. See *Brazzell v. Adams, supra*.

The *Prosise* decision loses sight of the real situation this case presents. There is nothing inherently unfair about attaching great signi-

ficance to a guilty plea to the commission of a serious offense.

The Fourth Circuit should have recognized that the federal court hearing Prosise's § 1983 action would be able to examine the state court record and determine the adequacy of the incentive to litigate for purposes of collateral estoppel. When the record in the state court clearly shows that the search in issue in the § 1983 case provided the basis for the conviction, it is plainly wrong to allow the convicted person to litigate that search. The circuit court also states that the "more important" reason behind its general rule of non-preclusion is its belief that since *Stone v. Powell*, 428 U.S. 465 (1976), the "§ 1983 federal forum is now the only one available for the assertion of this particular constitutional claim." *Prosise, supra* at 1142. This kind of reasoning can be characterized as an implicit distrust of the state court system; it shows a continued belief that every person must have at least one opportunity to pursue constitutional issues in federal courts. This rule is directly at odds with the principles set out in *Allen v. McCurry, supra, Stone v. Powell, supra,* and *Tollett v. Henderson, supra.*

There is no sufficient reason for permitting damage claims when those same persons are foreclosed from obtaining their freedom through *habeas corpus*. When a person pleads guilty in circumstances like Prosise's, it is proper to consider the plea a waiver of any further right to attack the search which provided the factual basis for the criminal conviction.

Significant judicial resources will be expended unnecessarily if the Fourth Circuit's decision is not reversed. The effect of a general application of the *Prosise* court's opinion would be to undermine severely state court criminal convictions, and to increase unnecessarily burden of the federal courts. For all of these reasons, this Court should reverse the Fourth Circuit Court of Appeals.

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No. 81-2169

IN THE

Supreme Court of the United States

October Term, 1982

GILBERT A. HARING, *et al.*,

Petitioners;

v.

JOHN FRANKLIN PROSISE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Whether respondent is precluded by the conventional doctrine of collateral estoppel from litigating, in an action under 42 U.S.C. §1983, Fourth Amendment claims which were neither raised nor litigated in his state criminal prosecution.

A. Whether a damages remedy under 42 U.S.C. §1983, based upon deliberate violations of respondent's Fourth Amendment rights, is barred as a matter of law merely because he entered a guilty plea in state court without regard for the motivations and circumstances underlying the plea.

B. Whether a rule which limits persons injured by deliberate Fourth Amendment violations to seeking exclusion of evidence illegally obtained as the sole remedy for violations of their rights comports with sound public policy.

II. Whether respondent knowingly and intentionally waived his statutory right to seek money damages under 42 U.S.C. §1983 for deliberate violations of his Fourth Amendment rights by pleading guilty in state court.

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The opinion of the United States Court of Appeals for the Fourth Circuit reversing the District Court's dismissal of respondent's *pro se* complaint is reported at 667 F.2d 1133 (1981), and is set forth in the Joint Appendix (J.A. 57-84).[1] The order of the District Court dismissing respondent's *pro se* handwritten complaint is unreported, but is set forth in the Joint Appendix (J.A. 46-56).

JURISDICTION

The order of the United States District Court for the Eastern District of Virginia, Alexandria Division, was entered on April 17, 1979 in *John F. Prosise v. Lt. Gilbert A. Haring, et al.*, Civil Action No. 79-105-AM (J.A. 46-56). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 30, 1981 in *Prosise v. Haring, et al.*, Docket No. 79-6310 (J.A. 57-84). The petition for rehearing and suggestion for hearing *en banc* was denied by the Court of Appeals on March 19, 1982 (J.A. 86-87). The petition for a writ of certiorari was granted by this Court on October 12, 1982, and counsel for respondent received Petitioners' Brief on November 30, 1982. By letter dated December 8, 1982 from Alexander L. Stevas, Clerk of the Supreme Court, the time for filing the Brief For Respondent was extended to and including January 29, 1983. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

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[1]References to the Joint Appendix filed with Petitioners' Brief shall be referred to as (J.A. _____).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1738 provides in pertinent part:

> Such Acts, records and judicial proceedings [of a state] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

This case arose when respondent filed a federal civil rights action under 42 U.S.C. §1983 seeking monetary damages from police officers of Arlington County, Virginia, based upon their deliberate conduct in illegally searching respondent's apartment and altering the scene to fabricate a plain view observation which was later used to obtain a search warrant authorizing seizure of contraband found by the police in respondent's apartment (J.A. 6-12). The District Court dismissed the complaint, holding that respondent's plea of guilty in state court collaterally estopped him from litigating in federal court the question of the lawfulness of the police conduct or, in the alternative, that respondent had waived his Fourth Amendment claims by pleading guilty (J.A. 52, 55). The Court of Appeals reversed, noting that *Allen v. McCurry*, 449 U.S. 90 (1980), requires federal courts to apply conventional doctrines of collateral estoppel to §1983 suits raising Fourth Amendment claims, and holding that respondent is not barred by the well-established doctrine of collateral estoppel from litigating his claims. The court also rejected petitioners' argument that respondent waived his Fourth Amendment claims by pleading guilty.

Respondent John Franklin Prosise commenced this lawsuit by filing a handwritten *pro se* complaint in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging that petitioners violated his Fourth and Fourteenth Amendment rights while acting under color of state law (J.A. 6-12).[2] Respondent alleged

[2]Petitioners' Statement of Facts is drawn in part from "the affidavits of the officers in support of their motions to dismiss and for summary judgment" (Petitioners' Brief 5 n. 1). However, because the District Court granted the motion for summary judgment (J.A. 46-56), respondent's version of the facts as alleged in his original complaint must be accepted as true on review by this Court. *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

that petitioners arrested him in his home on September 7, 1977 (J.A. 7-8). When he returned home upon his release from custody, respondent found a search warrant which falsely stated that certain chemicals had been seen by the police in plain view in the living room (J.A. 8). Respondent alleged that petitioners "searched [the] apt. and moved chemicals so they would be in plain sight, before getting the search warrant" (J.A. 8). He claimed that petitioners "conspired to move chemicals from boxes in [the] closet, to the living room in plain sight" (J.A. 9), and that they "conspired to keep silent, the truth" (J.A. 9). Respondent also alleged that petitioner Allen "falsified and swore to an affidavit to gain a legal search warrant" (J.A. 9) which had as its basis Allen's plain view observation of chemicals in respondent's apartment (J.A. 24). Finally, respondent claimed that several of the "factory seals had been broken on some of the bottles of chemicals, and some of the chemicals in them disposed of to make them look used" (J.A. 8).

Respondent eventually was charged in a two-count indictment with possessing and manufacturing phencyclidine, and on April 27, 1978, respondent entered a guilty plea to one count of manufacturing phencyclidine in exchange for the Commonwealth Attorney's written agreement to enter a *nolle prosequi* to the charge of possession of phencyclidine (J.A. 26-28). On June 15, 1978, respondent was sentenced to a period of twenty-five years in the penitentiary and was fined $1,000 plus court costs (J.A. 44).

In the District Court petitioners moved for summary judgment on respondent's Fourth Amendment claims on the ground that he "is barred under the doctrine of collateral estoppel as a result of the ... guilty plea to a criminal charge wherein the issue was necessarily adjudicated and waived" (J.A. 20-21). The District Court granted the motion, ruling that respondent's "guilty plea estops him from asserting a

fourth amendment claim in this §1983 suit [because t]he plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful" (J.A. 52). As an alternative ground, the District Court concluded that respondent's "guilty plea cut off his access to a federal habeas corpus forum to litigate a fourth amendment claim and at the same time should have a similar effect upon a §1983 suit" (J.A. 55).

On appeal, the undersigned counsel of record was appointed to represent respondent before the United States Court of Appeals for the Fourth Circuit. After the briefs were submitted to that court, but prior to oral argument, this Court granted a writ of certiorari in the case of *Allen v. McCurry, cert. granted,* 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980)(No. 79-935). Consequently, following oral argument the Court of Appeals stayed this case pending resolution of *Allen.*

After this Court rendered its decision in *Allen v. McCurry,* 449 U.S. 90 (1980), the Court of Appeals requested the parties to brief and argue the case in light of *Allen.* On December 30, 1981, the Court of Appeals reversed the District Court's disposition of the Fourth Amendment claims, remanding the case for appropriate action. The Court of Appeals held that respondent's guilty plea does not waive or bar his statutory right to litigate his Fourth Amendment claims in this suit under §1983 (J.A. 64-65, 77), holding that "a general rule of non-preclusion should obtain with respect to search and seizure issues in guilty plea cases" (J.A. 81).

Petitioners sought a rehearing or a rehearing *en banc* in the Court of Appeals, which was denied by the panel and by an evenly divided court on March 19, 1982. Petitioners then sought a writ of certiorari from this Court, which was granted on October 12, 1982.

SUMMARY OF ARGUMENT

The gravamen of this case is whether a damages remedy under 42 U.S.C. §1983 based upon deliberate violation of an individual's Fourth Amendment rights by the police may be barred as a matter of law whenever the individual pleads guilty to a criminal charge *regardless* of the motivations and specific circumstances underlying the plea. Petitioners argue in favor of a *per se* rule that entry of a guilty plea acts to bar *all* subsequent civil actions based on antecedent police misconduct. Respondent, on the other hand, submits that unlawful police conduct should not go unpunished merely because the illegal search uncovers contraband, but rather that persons should be encouraged to admit their guilt without invoking the exclusionary rule and then pursue their civil damages remedies against the erring police officers for the antecedent Fourth Amendment violations. This approach is particularly appropriate in cases such as this where the §1983 plaintiff seeks neither a declaration that the conviction is invalid, nor an injunction to prevent its enforcement.

Although §1983 may not have been an efficacious remedy for civil rights violations at the time the exclusionary rule was made applicable to the states, the statute has been strengthened considerably over the years. Section 1983 now provides a distinct but complementary alternative to the exclusionary rule for those persons willing to admit their guilt. This approach maintains the focus of the criminal trial on the question of the guilt or innocence of the accused, while permitting the collateral consequences of unlawful police conduct to be borne by the erring officers personally rather than by society at large. In short, society will benefit because all guilty parties will personally suffer the consequences of their unlawful conduct rather than permitting "the guilty ...

to go free because the constable has blundered," *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), or permitting the constable to go free because the defendant has admitted his or her guilt.

This approach is entirely consistent with the conventional doctrine of collateral estoppel which bars relitigation of claims that were litigated and decided in an earlier action, but leaves the parties free to litigate claims neither in issue nor decided in the earlier action, even though such claims could have been tendered and decided at that time. Because this Court held that conventional doctrines of collateral estoppel apply in §1983 actions, *Allen v. McCurry*, 449 U.S. 90 (1980), respondent is free under that doctrine to challenge the lawfulness of the police conduct in this case even though he pleaded guilty in state court. This is particularly true here because 28 U.S.C. §1738 (1976) requires federal courts to apply the rules of preclusion of the state in which the alleged constitutional violation arose, and Virginia gives no preclusive effect to criminal convictions whether obtained by plea or by trial.

Since nothing actually is "litigated" in a guilty plea, it should have no preclusive effect in a subsequent civil action even on elements of the offense. Moreover, because questions of the lawfulness of antecedent searches and seizures are irrelevant to the issue of factual guilt and are not litigated or admitted by a plea of guilty, the plea should have no preclusive effect on such questions in a subsequent civil action. This result is in accord with conventional principles of collateral estoppel, and with the strong public policy of providing an *effective* means of deterring unlawful police conduct while punishing those guilty of criminal offenses.

The fact that the state provides a mechanism for excluding unlawfully seized evidence of guilt should not, without more, preclude litigation of antecedent constitutional claims in a §1983 action. Unless the state's rules of preclusion bar a

subsequent civil action where available mechanisms are not pursued, no reason in either law or public policy countenances preclusion in an action under § 1983.

Finally, the choice to forego litigating a suppression motion in favor of entering a guilty plea does not indicate an intentional relinquishment of a statutory cause of action under § 1983. Respondent does not challenge the lawfulness of his guilty plea or conviction; nor does he seek his release from custody. Because habeas corpus is the proper means for obtaining such relief, and because an action under § 1983 for money damages is designed to afford relief of an entirely different nature, cases holding that habeas corpus relief for antecedent constitutional claims is barred by a guilty plea are inapposite to this action for damages under § 1983.

Moreover, a § 1983 action for damages will not permit persons to attack their convictions collaterally since they still will be foreclosed from habeas corpus relief by their pleas of guilty regardless of the outcome of a § 1983 action. For that reason, interests of comity and federalism are not undermined by permitting a subsequent action under § 1983. Although the collateral consequences of a guilty plea justifiably foreclose subsequent habeas corpus attacks upon the validity of the plea, no reason exists to extend that result to the point of precluding a statutorily created remedy for violations of the federal constitution which in no way implicate the finality of the state conviction.

ARGUMENT

I.

RESPONDENT IS NOT PRECLUDED FROM BRINGING AN ACTION IN FEDERAL COURT UNDER 42 U.S.C. §1983 TO LITIGATE SEARCH AND SEIZURE CLAIMS WHICH WERE NEITHER RAISED NOR LITIGATED IN HIS STATE CRIMINAL TRIAL.

The essential question presented by this case is whether 42 U.S.C. §1983 may be invoked as an alternative to the exclusionary rule to redress deliberate violations of the Fourth Amendment by state agents. More precisely, is respondent precluded by his guilty plea from litigating in a federal §1983 action search and seizure claims which were neither presented to nor determined by the state court, and which cannot be raised in either state or federal court by way of habeas corpus? In ruling that respondent is not precluded from litigating such claims, the court below created "a general rule of non-preclusion ... with respect to search and seizure issues in guilty plea cases." *Prosise v. Haring*, 667 F.2d 1133, 1141 (4th Cir. 1981). Respondent submits that the decision of the Circuit Court was correct and should be affirmed by this Court.

A. *Allen v. McCurry* Held That, Although Conventional Doctrines Of Collateral Estoppel Apply In §1983 Suits Raising Fourth Amendment Claims, Federal Courts Must Apply The Rules Of Preclusion Of The State In Which The Claim Arose.

Prior to the decision in *Allen v. McCurry*, 449 U.S. 90 (1980), the question whether the related doctrines of res judicata and collateral estoppel generally are applicable to §1983 actions was unsettled. In *Allen*, however, this Court affirmatively answered the question, ruling that "[t]he Court of Appeals erred in holding that McCurry's inability to obtain habeas corpus relief upon his Fourth Amendment claim renders the doctrine of collateral estoppel inapplicable to his §1983 suit." *Id.* at 105. Since respondent also is unable to obtain habeas corpus relief, a determination of the preclusive effect to be given his guilty plea in this §1983 suit must begin with an examination of *Allen*.

The *Allen* Court began its analysis by restating the conventional rules of preclusion:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Id. at 94 (citations omitted). After articulating the general rule and canvassing the development of the rules of preclusion in federal courts, the Court identified the "one general limitation" (*id.* at 95) on the doctrine of collateral estoppel: "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Id.* at 95. Finally, the Court pointed out that federal respect for state court judgments is not a matter of judicial grace, it is the command of Congress in 28 U.S.C. §1738 (1976). *Id.* at 96.

In dissent, Justice Blackmun characterized the majority's opinion as meaning that:

> the collateral estoppel effect of prior state adjudication should turn on only one factor, namely, what it considers the "one general limitation" inherent in the doctrine of preclusion: "that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." If that one factor is present, the Court asserts, the litigant properly should be barred from relitigating the issue in federal court.

Id. at 113 (citation omitted). The operation of this rule, Justice Blackmun continued, "of course would bar a § 1983 litigant from relitigating any issue he *might* have raised, as well as any issue he actually litigated in his criminal trial." *Id.* at 113 n. 12 (emphasis in original).

The majority took exception to this interpretation, observing:

> Contrary to a suggestion in the dissenting opinion, this case does not involve the question whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation.

Id. at 94 n. 5 (citation omitted). Thus, the precise question presented by the case at bar specifically was not addressed in *Allen* and remains to be decided by this Court.

Continuing its comment upon the dissent, the majority stressed that:

> our decision today does not "fashion" any new, more stringent doctrine of collateral estoppel, *nor does it hold that the collateral estoppel effect of a state court decision turns on the single factor of whether the State gave the federal claimant a full and fair opportunity to litigate a federal question.* Our decision does not "fashion" any doctrine of collateral estoppel at all. Rather, it construes § 1983 to determine whether the conventional doctrine of collateral estoppel applies to the case at hand.

Id. at 95 n. 7 (citation omitted) (emphasis added). Signifi-

cantly, in reversing the Court of Appeals the Court remanded the case to "decide *how* the body of collateral estoppel doctrine or 28 U.S.C. §1738 should apply in this case." *Id.* at 105 n. 25 (emphasis in original).

Allen strongly suggests that the conventional doctrine of collateral estoppel should apply to the instant case rather than a "new more stringent" (*id.* at 95 n. 7) variety.[3] As the Circuit Court correctly pointed out, the majority's response to the dissent leads inescapably to the conclusion that:

> a state's failure to provide a full and fair opportunity to litigate the issue might, within the conventional doctrine, *avoid* an otherwise appropriate application of collateral estoppel, rather than the obverse, that provision of the full and fair opportunity, standing alone, gives rise to collateral estoppel.

Prosise, 667 F.2d at 1137 n. 1 (emphasis in original).

Although it may be true that the legislative history of §1983 indicates no intent to repeal or restrict the conventional doctrine of collateral estoppel, neither does it evidence an intent to permit federal courts to apply "any new more stringent doctrine of collateral estoppel" (*id.* at 95 n. 7) or to ignore the command of §1738, merely because respondent

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[3]Petitioners argue that "[t]he doctrine of res judicata ... is also applicable to the *Prosise* case" (Petitioners' Brief 21-22). In their motion for summary judgment in the District Court, however, petitioners asserted only that respondent's "claim is barred under the doctrine of collateral estoppel" (J.A. 20). The District Court (J.A. 49, 52) and the Circuit Court (667 F.2d at 1142-43) limited their holdings to the question whether respondent was collaterally estopped from litigating those claims. Finally, in their Petition For Writ Of Certiorari, petitioners sought review on the question "Does a conviction based upon a plea of guilty collaterally estop" respondent's §1983 suit (Petition For Writ Of Certiorari at i). Consequently, petitioners cannot assert at this late date that the broader doctrine of res judicata applies to bar respondent's claims. *See generally* R. Stern & E. Gressman, *Supreme Court Practice* 456-65 (5th ed. 1978).

pleaded guilty. On the contrary, federal courts "can afford [state judgments] no greater efficacy," *Union & Planters' Bank of Memphis v. Memphis*, 189 U.S. 71, 75 (1903), than would the rendering state.

In this regard, *Kremer v. Chemical Construction Corp.*, 102 S.Ct. 1883 (1982), conclusively established that federal courts may give no *greater* preclusive effect to state court judgments than would the rendering state. In reaching this conclusion, the Court stated:

> It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken.

Id. at 1897.

The command of § 1738 is particularly appropriate in § 1983 suits which are directed at state rather than federal agents. The state obviously has a strong interest in establishing the rules of preclusion in such matters. On the other hand, giving preclusive effect to a Virginia judgment beyond that afforded by Virginia's own rules of preclusion would do greater violence to the admittedly important concerns of comity and federalism than does permitting this suit.

Consequently, the court below was correct when it turned first to the preclusion rules of Virginia to determine the preclusive effect to be given respondent's guilty plea. As the Circuit Court correctly recognized, the settled law of Virginia is that, with limited exception not relevant here, criminal convictions, whether by plea or by trial, have no preclusive effect in subsequent civil actions.

B. Virginia Law Gives No Preclusive Effect To Criminal Convictions In Subsequent Civil Actions.

As the Court of Appeals correctly noted, the general rule of preclusion in Virginia derives from the holding in *Supervisors of Tazewell County v. Norfolk & Western Ry. Co.*, 119 Va. 763, 91 S.E. 124 (1916):

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Aetna Casualty & Surety Co. v. Czonka, 200 Va. 385, 388, 105 S.E.2d 869, 872 (1958).

In *Czonka*, a person in privity with the civil defendant had entered a guilty plea to an offense which had as an essential element a dispositive issue in the civil suit. The court refused to give the guilty plea any preclusive effect, referring instead to the general rule of *Tazewell County* that criminal convictions have no preclusive effect in subsequent civil suits. Thus, in Virginia, criminal convictions, whether by plea or by trial, are given no preclusive effect in subsequent civil actions.[4]

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[4]The single limited exception to this rule arises in civil actions in which the plaintiff seeks to benefit by the wrong for which he previously was convicted. The exception was identified and explained in *Eagle, Star & British Dominions Insurance Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927), in which the civil plaintiff sought to recover under an insurance policy for goods he previously was convicted of intentionally burning. Even in such cases, though, the court carefully limited the exception to instances in which the civil plaintiff "has once litigated the identical question and had it adversely decided" in the criminal trial. 149 Va. at 89.

Virginia has maintained the general rule of preclusion announced in *Tazewell County* for over 65 years, consistently applying it to other circumstances and in other contexts. For instance, in *Luke Construction Co. v. Simpkins,* 223 Va. 387, 291 S.E.2d 204 (1982), the Virginia Supreme Court reiterated that the preclusive effect of collateral estoppel "extends only to those facts in issue which were adjudicated in the former proceeding." *Id.* at 205. And in *Bernau v. Nealons,* 219 Va. 1039, 254 S.E.2d. 82 (1979), the court instructed that, "one who asserts the defense of res adjudicata [sic] has the burden of proving that the very point or question was in issue and determined in the former suit." *Id.* at 1043 (quoting *Feldman v. Rucker,* 201 Va. 11, 18, 109 S.E.2d 379, 384 (1959)). Finally, in *Hosier v. Hosier,* 221 Va. 827, 273 S.E.2d 564 (1981), the court stressed that:

> A judgment is not res adjudicata [sic] if it does not go to the merits of the case. To constitute a bar, it must appear either upon the face of the record or be shown by extrinsic evidence that the previous question was raised and determined in the former suit, and that the former suit was determined on its merits.

Id. at 830 (quoting *Storm v. National Mutual Insurance Co.,* 199 Va. 130, 134, 97 S.E.2d 759, 761 (1957)).

The court has explained that the rule against giving preclusive effect to criminal convictions is based upon the rule of mutuality which bars a party "from invoking the preclusive force of a judgment unless he would have been bound had the prior litigation of the issue reached the opposite result." *Norfolk & Western Ry. Co. v. Bailey,* 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980). Although largely discarded in federal courts, *see Allen v. McCurry,* 449 U.S. at 94-95, the Supreme Court of Virginia consistently has

declined to abandon this rule both in cases of attempted "offensive" use of collateral estoppel, *Norfolk & Western Ry. Co., supra,* as well as in cases of attempted "defensive" use of collateral estoppel. *Greene v. Warrenton Production Credit Assoc.,* 223 Va. 462, 291 S.E.2d 209 (1982). Since under Virginia law petitioners in this action would not be bound in a subsequent damages action by the state court's ruling on a motion to suppress had one been made and granted, Virginia's well-settled rules of preclusion do not bar respondent from raising his claims in this suit.

Unfortunately, in its commendable effort to find a Virginia decision on "the precise, narrow question of the preclusive effect of a guilty plea judgment upon issues that in the state criminal prosecution could only have been relevant to determining the admissibility of evidence" (667 F.2d at 1138), the court below missed the forest for the trees. If, as has been discussed above and as was found by the Court of Appeals, Virginia would give no preclusive effect to a guilty plea on even essential elements of the offense, *a fortiorari* Virginia would give no preclusive effect in subsequent civil suits to challenges to the admissibility of evidence which could have been but were not made in the prior criminal trial. Moreover, because petitioners here would not have been bound by such a ruling on the admissibility of evidence had one been made, under well-settled rules of preclusion in Virginia, respondent likewise is not precluded from litigating his claims in this action.

For these reasons, as well as those enunciated by the court below, respondent is not precluded by the conventional doctrine of collateral estoppel as developed in Virginia from litigating his Fourth Amendment claims in this suit. Because the Court of Appeals considered the issue unsettled in Virginia, and turned its attention to general collateral estoppel principles as developed in federal courts "as a guide

to Virginia's likely view were the precise question presented to its highest court or as an independent source for the proper application of collateral estoppel doctrine to our question" (667 F.2d at 1139), respondent likewise will discuss those general principles of collateral estoppel.

C. The Conventional Doctrine Of Collateral Estoppel Developed In Federal Courts Gives No Preclusive Effect To Guilty Pleas And Therefore Does Not Bar Litigation Of Previously Unlitigated Fourth Amendment Claims In A Federal Cause Of Action Under § 1983.

As dissupped above, *supra* at 10, the conventional doctrine of res judicata developed in federal courts "precludes the parties ... from relitigating issues that were *or could have been* raised in [an earlier] action." *Kremer v. Chemical Construction Corp.*, 102 S.Ct. 1883, 1889 n. 6 (1982) (emphasis added). On the other hand, "[u]nder collateral estoppel, once a court decides an issue of fact or law necessary to its decision, that decision precludes relitigation of the same issue on a different cause of action between the same parties." *Id.* at 1889-90 n. 6. Thus, whereas the broader doctrine of res judicata precludes litigation of issues that could have been raised in the earlier action, collateral estoppel leaves "parties free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948).

Because this Court stressed in *Allen* that "the conventional doctrine of collateral estoppel applies" in § 1983 suits raising Fourth Amendment claims, and not some "new more stringent doctrine of collateral estoppel" (449 U.S. at 95 n.

7), respondent is not precluded by the earlier state proceeding unless his guilty plea somehow involved a litigation of the search and seizure claims at issue.[5]

As the court below correctly noted, the *Restatement of Judgments* suggests that criminal convictions based upon guilty pleas can have no collateral estoppel effect as to any issues because none actually has been litigated. *Restatement (Second) of Judgments* 133, Comment b (1980). *See also Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Cf. United States v. International Building Co.*, 345 U.S. 502 (1953) (prior judicial determination of tax liability based upon a stipulation of the parties refused collateral estoppel effect where it was unclear whether the stipulation was based upon the merits of the claimed tax liability). Whatever may be said about guilty pleas constituting a waiver of antecedent constitutional claims, *see* Petitioners' Brief 28-32, it cannot be argued that any issues actually are "litigated" in the traditional sense of the word.

This conclusion is reinforced by this Court's decisions with regard to the nature of the guilty plea and the plea bargaining process in the so-called *Brady* trilogy[6] and in

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[5]It is important to note the limited nature of the issue before the Court. The narrow question presented by this case is whether a state court judgment entered on a guilty plea may preclude litigation in a subsequent federal §1983 action of a claim that was neither raised nor litigated in state court, and which only could have been litigated in a motion to suppress evidence on Fourth Amendment grounds. The Court is not faced with the related questions of whether a guilty plea may preclude litigation of essential elements of the offense to which the state defendant pleaded guilty, or whether such a plea may be preclusive as to *any* §1983 issue. In light of the Circuit Court's express refusal to answer these questions, *Prosise*, 667 F.2d at 1138, respondent submits they are not properly before the Court and need not be decided. However, because of the possibility that the Court will reach them, the relevant principles are discussed above.

[6]*Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); and *Parker v. North Carolina, 397 U.S. 790 (1970).*

North Carolina v. Alford, 400 U.S. 25 (1970). This Court has stressed that the guilty plea and the plea bargaining process, when properly administered, are vital components of our criminal justice system. *Bordenkircher v. Hayes,* 434 U.S. 357 (1978). Such pleas necessarily reflect the consent of the defendant to have judgment entered without a trial, *North Carolina v. Alford,* 400 U.S. 25 (1970), and a willingness on the defendant's part to "enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady v. United States,* 397 U.S. 742, 753 (1970). Guilty pleas also obviate the costly and time consuming process involved in a pre-trial motion to suppress evidence and jury trial. Thus, there are strong policy considerations favoring guilty pleas.

As the *Brady* Court correctly recognized, though, a person charged with crime might intelligently plead guilty for any number of reasons both related and unrelated to factual guilt. In *Alford,* the Court held that even an assertion of factual innocence is not a bar to a voluntary and intelligent guilty plea, recognizing that many reasons exist for pleading guilty aside from belief in one's factual guilt. As the *Alford* Court observed:

> since "guilt, or the degree of guilt, is at times uncertain and elusive," "[a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty ..." As one state court observed nearly a century ago, "[r]easons other than the fact that he is guilty may induce a defendant to so plead, ... [and] [h]e must be permitted to judge for himself in this respect."

Id. at 33 (citations omitted). Thus, it is clear that a guilty plea standing alone can have no collateral estoppel effect since it

does not necessarily imply an admission of the facts necessary to establish guilt, and because it does not involve litigation of those facts in the adversarial sense.

These cases compel rejection of petitioners' repeated claim that the only possible reason respondent would have entered a guilty plea is due to his factual guilt. Likewise, this reasoning compels rejection of the "emerging doctrine", *Prosise,* 667 F.2d at 1140, of collateral estoppel permitting preclusion of claims which involve elements of the crime charged. No sound reason in logic or the law permits preclusion of such "element-issues" (*id.*) in guilty plea cases because, as this Court repeatedly has recognized, guilty pleas do not necessarily involve an admission even of the elements of the offense.

Even more distressing is petitioners' argument and the District Court's conclusion that "the plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful" (J.A. 52). Aside from totally ignoring the import of *Alford* and the *Brady* trilogy that many reasons exist for pleading guilty, aside from an admission of factual guilt, petitioners' argument is based on the mistaken premise that search and seizure issues are somehow akin to element-issues; that the exclusion of evidence arises naturally from the unlawful police conduct. That argument would have validity only if guilty pleas preclude element-issues, and only then if the exclusion of illegally seized evidence were a constitutional requirement, which it of course is not. *See, e.g., Stone v. Powell,* 428 U.S. 465, 483 (1976) ("The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment.") Although a guilty plea may act as a waiver of objections to the admissibility of evidence used to support a plea, *McMann v. Richardson,* 397 U.S. 759 (1970), it can in no

way be characterized as an admission of the lawfulness of the manner in which such evidence was obtained.

Even were the Court to conclude that a plea of guilty may preclude litigation of element-issues because of the defendant's judicial "admission of factual guilt," *Menna v. New York*, 423 U.S. 61, 63 (1975), no such preclusive effect can be given to Fourth Amendment claims because a guilty plea involves no such admission on those questions.

D. The Fact That The State Provides A Procedural Mechanism For Challenging The Lawfulness Of Searches And Seizures In Criminal Trials Does Not Preclude Respondent From Litigating Previously Unlitigated Claims In A Federal § 1983 Action.

Respondent concedes, as he must, that Virginia provides a procedural mechanism for challenging the lawfulness of searches and seizures in criminal trials, and in that sense afforded him a "full and fair opportunity," *Allen*, 449 U.S. at 104, to litigate his Fourth Amendment claims. However, respondent agrees with the court below that, whereas the state's failure to provide such a mechanism would avoid application of collateral estoppel, provision of such a mechanism, standing alone, does not bar his claims. *Prosise*, 667 F.2d at 1137 n. 1.

What the "full and fair opportunity" language in *Allen* must mean is that if one takes advantage of state procedural mechanisms for challenging the lawfulness of a search and seizure, he or she normally is bound by the state court's decision insofar as the state's preclusion rules give it collateral estoppel effect; unless the procedural mechanism does not satisfy the requirements of due process, that is, did not afford a "full and fair opportunity" to litigate such claims. On the other hand, if, as is true in Virginia, no

preclusive effect is given to criminal judgments, the existence of such a procedural mechanism will not preclude subsequent litigation of Fourth Amendment claims. Otherwise, there would have been no reason for the *Allen* Court to remand the case to the Circuit Court to "decide *how* the body of collateral estoppel or 28 U.S.C. §1738 should apply in th[at] case" (449 U.S. at 105 n. 25) since McCurry clearly had litigated and lost his claims in state court.

It is interesting to note that the "full and fair opportunity" language of *Allen* also is used in *Stone v. Powell*, 428 U.S. 465 (1976), where the Court cited *Townsend v. Sain*, 372 U.S. 293 (1963), as providing a relevant measure of the adequacy of the opportunity afforded by the state to litigate Fourth Amendment claims. *Stone*, 428 U.S. at 493 n. 36. *Townsend* dealt with the adequacy of state proceedings as a guide to determining whether a federal habeas corpus court must grant a state petitioner a new evidentiary hearing before ruling on the habeas petition. In that regard, this Court held that:

> a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

Although respondent does not contend that *Townsend* provides a mechanistic measure of the adequacy of the opportunity afforded to those who invoke the state's proce-

dural mechanism for testing the lawfulness of a search and seizure, neither can *Townsend* be ignored. For example, if the state conducted a hearing on a defendant's Fourth Amendment claim, but refused to resolve the merits of the claim, clearly that would not satisfy the "full and fair opportunity" standard. Thus, in instances in which the state defendant takes advantage of the state mechanism, *Townsend* provides a useful guide for testing the adequacy of the opportunity afforded. However, neither *Allen* nor *Townsend* bar a subsequent civil suit merely because the state provides a mechanism for testing the lawfulness of searches, unless the state's rules of preclusion require that result.

II.

BY PLEADING GUILTY IN STATE COURT RESPONDENT DID NOT VOLUNTARILY AND INTENTIONALLY WAIVE HIS RIGHT TO LITIGATE ANTECEDENT FOURTH AMENDMENT CLAIMS IN A SUIT UNDER 42 U.S.C. § 1983.

Petitioners argue that respondent's guilty plea constitutes a waiver of his right to challenge the lawfulness of an antecedent search and seizure claim in a § 1983 action (J.A. 28-32). This argument, however, fundamentally misapplies the law and ignores the obvious differences between an action under § 1983 and a federal habeas corpus petition. Simply stated, the doctrine of collateral estoppel, unlike the doctrine of res judicata, does not include an element of waiver, so that under the former doctrine "the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been

tendered and decided at that time." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948).

Petitioners' error arises from their interpreting habeas corpus cases (that do not even involve waiver) to imply a waiver in §1983 actions. Specifically, petitioners rely upon *Tollet v. Henderson*, 411 U.S. 258 (1973), to construct an argument that "a criminal defendant who pleads guilty waives the right to raise antecedent constitutional objections in subsequent proceedings" (J.A. 28). This characterization of the holding in *Tollet* is only partly correct. What *Tollet* actually held is that a state prisoner who pleaded guilty is foreclosed from seeking his release from custody through a federal habeas corpus action challenging his conviction on the basis of constitutional claims antecedent to his guilty plea. *Id.* at 266.

Tollet simply has no application to cases in which a civil plaintiff seeks money damages for constitutional violations in a §1983 action. In fact, as the Court pointed out in *Menna v. New York*, 423 U.S. 61, 62 n. 2 (1975), *Tollet* is not a waiver case at all. Rather, *Tollet* stands for the proposition that:

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea [as a means of obtaining his release from custody in a federal habeas corpus action].

Id. at 267.

Thus, *Tollet* has no application to the instant suit for damages under §1983. Respondent does not challenge the lawfulness of his conviction; nor does he seek release from custody. Rather, respondent has done just what several

members of this Court have encouraged criminal defendants to do: admit his guilt and seek civil damages relief for antecedent Fourth Amendment violations.

The flaw in petitioners' argument is illustrated by *Preiser v. Rodriguez*, 411 U.S. 475 (1973), in which the Court explained:

> [i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy [for alleged constitutional violations].

Id. at 494 (emphasis in original). In his §1983 complaint instituting this suit, respondent sought neither a declaration that his criminal conviction is invalid, nor an injunction to prevent its enforcement. Instead, respondent sought only compensatory and punitive damages as a means of redressing the antecedent constitutional violations, and as a means of deterring such violations by these officers in the future (J.A. 12-13).

Petitioners nevertheless argue that permitting respondent to litigate this suit "will encourage persons convicted on guilty pleas ... to challenge their state court convictions through §1983 actions" (Petitioners' Brief 14), and that it would create "a new method by which defendants can indirectly attack the validity of their quilty pleas" (Petitioners' Brief 15). The fundamental flaw in this reasoning is that regardless of the outcome of this §1983 suit, respondent still will be precluded by *Tollet* from seeking to challenge either his guilty plea or his conviction in order to obtain his release from custody on the basis of the constitutional claims which underlie this suit.

Significantly, petitioners fail to discuss the well established standard that "a waiver is an intentional relinquish-

ment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A guilty plea, standing alone, does not evidence such an intentional relinquishment of a statutory right to sue state agents for damages under §1983 for antecedent constitutional violations. Nor does the decision not to object to such violations in a pre-trial motion to suppress evidence exhibit an intentional relinquishment of the statutory right.

What a guilty plea does evidence is "the defendant's admission ... that he committed the acts charged in the indictment," *Brady v. United States*, 397 U.S. 742, 748 (1970), and his "consent that judgment of conviction may be entered without a trial." *Id.* at 748. The collateral consequences of a guilty plea, while justifiably foreclosing subsequent habeas corpus attacks based upon the validity of the plea itself, should not extend to the point of precluding a statutorily created remedy for violations of the federal constitution.

III.

SECTION 1983 PROVIDES AN ALTERNATIVE MEANS OF REDRESS FOR VIOLATIONS OF THE FOURTH AMENDMENT PERMITTING PERSONS TO PLEAD GUILTY IN STATE COURT WITHOUT SEEKING TO EXCLUDE THE EVIDENCE OF THEIR GUILT, AND THEN TO SEEK DAMAGES IN AN ACTION AGAINST ERRING STATE AGENTS UNDER 42 U.S.C. §1983.

The underlying premise of petitioners' position is stated in their first argument: "The decision of the Fourth Circuit will encourage persons convicted on guilty pleas to litigate

claims of unlawful search and seizure ... through §1983 actions" (Petitioners' Brief 14) rather than through motions to suppress evidence in their criminal trials. This premise is founded on the absurd notion that criminal defendants place more value on a potential damages award than on their liberty. Petitioners seem to suggest a preference for application of the exclusionary rule over litigation of a search's constitutionality in a civil action under §1983. That preference is not surprising in light of the fact that petitioners would not be directly affected if a motion to suppress evidence were granted, whereas they personally would be mulcted in damages if this suit were successful. In other words, if they have erred, petitioners would rather society in general suffer the consequences than have to suffer for it themselves.[7]

That society and not erring police officers must suffer the consequences of Fourth Amendment violations is the very basis of the debate raging within the legal community over the efficacy of the exclusionary rule as a remedy for such constitutional violations. *See, e.g., Illinois v. Gates,* No. 81-430 (U.S. Oct. 18, 1982) (restored to the calendar for reargument on the question whether to create a good-faith exception to the exclusionary rule); *California v. Minjares,* 443 U.S. 916 (1979) (Rehnquist, J., dissenting from denial of a stay); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) (Burger, C.J., dissenting); Burger, *Who Will Watch the Watchman?,* 14 Am.Univ.L.Rev. 1 (1964). It would be alarmingly ironic for the Court to establish a good-faith exception to the judicially created exclusionary rule on the ground that it is

[7] In this regard, it is important to keep in mind that this suit involves an allegation of a deliberate Fourth Amendment violation rather than a good-faith error in judgment (*see* Complaint, J.A. 1-13). For that reason as well, it is inappropriate and unwise to shift the collateral consequences of petitioners' unlawful conduct from them personally to society at large.

"the guilty [who] go free because the constable has blundered," *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), while simultaneously closing the last open door to a statutorily created §1983 damages remedy *merely* because the criminal defendant is willing to admit his guilt and suffer the consequences. Even more significantly, perhaps, such a result would give police officers the "impression, however unwarranted, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared." *Bivens*, 403 U.S. at 421 (Burger, C.J., dissenting).

It is important to note that in *Wolf v. Colorado*, 338 U.S. 25 (1949), this Court held that the Fourth Amendment was applicable to the states through the Fourteenth Amendment, but that the states were free to choose from among the various remedies for Fourth Amendment violations and were not constitutionally obligated to adopt the exclusionary rule. However, only twelve years later, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court overruled *Wolf* and held that the states indeed were required to adhere to the exclusionary rule, concluding that it represented the only viable means of enforcing the Fourth Amendment because experience had shown civil damages actions against erring police officers to be ineffectual.

Simultaneous to the development of the exclusionary rule, the Court was reevaluating the long dormant Ku Klux Klan Act, 42 U.S.C. §1983, which creates a private cause of action against state agents for redress of violations of the federal constitution. At the time of *Mapp*, the Court apparently felt §1983 was an inadequate alternative to the exclusionary rule. Since then, however, §1983 has undergone many changes.

In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court held that state agents sued under §1983 may be liable for both

compensatory and punitive damages. In *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978), the Court provided a "deep state pocket," *Minjares,* 443 U.S. at 925, for redress of constitutional violations by holding that municipalities are "persons" within the meaning of §1983, and that one seeking redress for the deprivation of federal rights need not initiate alternative (though perhaps adequate) state remedies before filing a §1983 action. In *Owen v. City of Independence,* 445 U.S. 622 (1980), the Court held that municipalities sued under §1983 are not entitled to qualified immunity by asserting the good-faith of its agents as a defense. And in *Patsy v. Board of Regents,* 102 S.Ct. 2557 (1982), the Court held that one need not exhaust alternative state remedies before bringing an action under §1983 for redress of federal constitutional violations.

Respondent does not mean to imply that he believes that §1983 now is adequate to fully supplant the exclusionary rule as a remedy for Fourth Amendment violations. On the contrary, respondent submits that the two remedies are complementary and should be maintained in their current form. However, for persons such as respondent who are willing to admit their guilt without consuming the state court's valuable resources, neither law nor public policy is served by foreclosing a statutory federal remedy for redress of constitutional violations which in no way implacate the validity or finality of state convictions.

The primary justification of the exclusionary rule is the need for deterrence of unlawful police activity. *See Stone v. Powell,* 428 U.S. 465 (1976). Although the basic purpose of §1983 is to compensate persons for injuries caused by violations of their constitutional rights, *Carey v. Piphus,* 435 U.S. 247 (1978), it goes without saying that damage actions

have the additional function of deterring and punishing state agents for Fourth Amendment violations. *Carlson v. Green*, 446 U.S. 14 (1980). Because the two remedies accomplish the same objective of deterring unlawful police activity, and because this Court has held that a person aggrieved by unlawful police conduct need not invoke alternative state remedies before invoking § 1983, *Patsy v. Board of Regents*, 102 S.Ct. 2557 (1982), no reason exists for requiring persons like respondent to seek exclusion of the evidence of their guilt rather than invoking § 1983 to redress constitutional claims unrelated to their guilt.

Petitioners, on the other hand, argue that permitting this suit to go forward will encourage such litigation (Petitioners' Brief 14), and *amici* complain that it "will subject increasing numbers of law enforcement officers to the harassment and vexation of groundless civil litigation" (Brief of *Amici* Americans For Effective Law Enforcement 5) (hereinafter Brief of *Amici*), supporting their argument with statistics on the increasing number of civil suits filed in federal courts.[8] (Brief of *Amici* 5-11). Aside from the fact that these statistics do not reveal anything about the number of frivolous claims among those lawsuits, the possibility of increased litigation—even of possibly frivolous litigation—does not justify "closing the courthouse door" to persons aggrieved by Fourth Amendment violations. *Bivens v. Six*

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[8]It is interesting to note that the International Association of Chiefs of Police [IACP], who have joined as *amicus curiae* in support of petitioners, also opposes creation of the sort of administrative or quasi-judicial police review bodies proposed by the Chief Justice in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting). *See* IACP Speakers Discuss Legal Problems In Disciplining Police Officers, 32 Cr.L. 2221, 2222 (Dec. 15, 1982). Apparently IACP is content to have criminal defendants seek to exclude relevant evidence of their guilt rather than subject IACP members to administrative or judicial review of their actions.

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

Moreover, if the burden on federal courts is becoming more than the system can handle, then Congress should eliminate diversity jurisdiction cases, which raise no federal questions, before restricting a statutorily created remedy for federal constitutional violations. Additionally, when Congress has noted that a particular form of § 1983 action has become too burdensome on the courts, it has shown itself willing to alleviate the problem by passing new legislation to deal with it. *See* The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.* (1976 ed., Supp. IV). Finally, as the Court observed in *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), any suits engendered by the Court's ruling in this case need not receive "full litigation" (Petitioners' Brief 27), but may be disposed of on motions for summary judgment without inquiry into the "subjective good-faith" of the officers. *Id.* at 2738.[9]

In short, petitioners' position would subvert the strong policy of providing a federal forum for adjudication of federal constitutional rights. *See, e.g., Steffel v. Thompson*, 415 U.S. 452 (1974); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961). Although the *Allen* Court found this consideration insufficient to override the application of conventional doctrines of collateral estoppel, *see Allen v. McCurry*, 449 U.S. at 98-99, it still is a sufficient interest counselling against an extension of the preclusion doctrine beyond that envisioned by Congress in § 1738, and beyond that permitted by the state where the Fourth Amendment violation occurred.

[9]Although *Harlow* involved a direct constitutional cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court noted in *dictum* quite logically that no distinctions for purposes of immunity should be drawn between such actions and actions under 42 U.S.C. § 1983. *Harlow*, 102 S.Ct. at 2738-39 n. 30.

CONCLUSION

For the foregoing reasons, and in the interest of justice and fundamental fairness, respondent respectfully submits that the judgment of the Court of Appeals was correct and should be affirmed.

Respectfully submitted,

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No. 81-2169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GILBERT A. HARING, Lieutenant,
Arlington County Police Department, et al.,

Petitioners,

vs.

JOHN FRANKLIN PROSISE,

Respondent.

On Writ Of Certiorari to the United States
Court of Appeals for the Fourth Circuit

REPLY BRIEF TO THE BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Can a person who has pleaded guilty in a state criminal court to manufacturing illegal drugs, and who did not raise the validity of the search that produced the essential evidence of the crime, subsequently bring an action in a federal court under 42 U.S.C. § 1983 claiming that the search was unconstitutional?

a. By pleading guilty in a state criminal court, does a person waive any right to litigate in a § 1983 action the constitutionality of the search which produced the essential evidence of the crime?

b. Does a conviction based upon a plea of guilty collaterally estop the later litigation in a federal court § 1983 action of the search and seizure claim, where the state court expressly found a sufficient factual basis for the plea and that basis was the evidence produced by the search?

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IN THE

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On Writ Of Certiorari to the United States
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REPLY BRIEF TO THE BRIEF FOR RESPONDENT

I. RESPONDENT'S BRIEF PERPETUATES THE COURT OF APPEALS' ERROR BY ARGUING THAT, IN VIRGINIA, A FLAT RULE OF NONPRECLUSION ALWAYS PERMITS PERSONS WHO PLEAD GUILTY TO SUE POLICE OFFICERS FOR MONEY DAMAGES.

Respondent argues that "Virginia gives no preclusive effect to criminal convictions whether obtained by plea or by trial." (Respondent's Brief, p. 8). This argument perpetuates the error of the Court of Appeals for the Fourth Circuit. In

effect, the Court of Appeals held that, in Virginia, a flat rule of nonpreclusion always permits persons to sue police officers pursuant to 42 U.S.C. § 1983, notwithstanding a claimant's guilty plea. See *Prosise v. Haring*, 667 F.2d 1133, 1142 (4th Cir. 1981) (28 U.S.C. § 1738 requires Virginia law to be followed).

Contrary to the briefs filed for and on behalf of Respondent, the pleas of estoppel and res judicata, although otherwise used sparingly, have been applied in Virginia in order to preclude civil actions brought by pesons who sue law enforcement officers after pleading guilty. *Souders v. Gabrielson* (Va. S.Ct. 1975 Record No. 741124) demonstrates that the mutuality of estoppel doctrine, sometimes invoked in Virginia, does not defeat a police officer's plea of preclusion when the plaintiff in a civil suit had previously pleaded guilty in a criminal proceeding. Indeed, in *Souders v. Gabrielson*, the Virginia Supreme Court affirmed the judgment of the Circuit Court which sustained the plea of estoppel and res judicata filed by police officers who were named as defendants in a civil action. The appendix to the Petitioner's "Reply Brief to Opposition to Petition for Writ of Certiorari," pp. 1a-10a, includes the Plea of Estoppel and Res Judicata, the trial court's order sustaining the Plea, the plaintiff's Notice of Appeal and Assign-

ment of Errors and the Virginia Supreme Court's order denying the Petition to Appeal and affirming the trial court.[1]

Souders had pleaded guilty to charges made by Officer Gabrielson, but later sued the arresting officers for using excessive force during the arrest. (*Id.* at 9a and 5a). The Circuit Court of Arlington County held that Souders' plea of guilty precluded the subsequent damage action against the arresting officers. Souders then filed a petition for writ of error in the Virginia Supreme Court assigning the following as reversible errors of law: "[T]he matter was not...between the

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[1]The order of the Virginia Supreme Court provides, in pertinent part, as follows:

> "The petition of Guthrie E. Souders for a writ of error to a judgment rendered by the Circuit Court of Arlington County on the 18th day of July, 1974, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Edward Gabrielson and others were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court."

same parties or privies, the issue determined in the prior criminal actions is not the same issues [sic] in the instant case, nor was the issue of facts [sic] in the instance case...actually litigated...." (*Id.* at 5a-6a.) Souders also assigned as reversible error the Circuit Court's refusal to apply the "test of mutuality." (*Id.* at 6a.) The Supreme Court of Virginia dismissed the petition for a writ of error, and sustained the Circuit Court's resolution of the res judicata and estoppel issues in favor of the police officers, including Gabrielson, who were named as defendants in the civil action.

The *Souders* precedent, although unreported, is the Virginia case known to the Petitioners that comes closest to the instant case. In Virginia, the denial of a petition for writ of error (or petition for appeal) is a decision which affirms the trial court's decision. *Virginia Electric and Power Company v. Clarke*, 179 Va. 596, 19 S.E.2d 693 (1942). Respondent Prosise admitted that he was guilty of the crime for which he was convicted and the trial court judge found that the plea of guilty was "voluntarily and intelligently tendered." (J.A. 41). Respondent was represented by counsel and at no time did Respondent Prosise put the state court or the Petitioners on notice that he objected to the search warrant until he filed a civil action pursuant to 42 U.S.C. § 1983. The *Souders* precedent precludes such an action due to

this Court's recognition of the following principle: under 28 U.S.C. § 1738, state judgments are to be given the same preclusive or nonpreclusive effect by federal courts as they would be given by courts of the judgment-rendering state. See *Kremer v. Chemical Construction Corps.*, 102 S.Ct. 1883 (1982). Since the briefs filed for and on behalf of Respondent do not so much as mention the *Souders* precedent, their elaboration of Virginia's law of preclusion, however interesting, is incomplete and somewhat misleading.

Souders v. Gabrielson is consistent with Virginia's conventional position that the preclusive effects of a prior valid judgment in Virginia "rest upon considerations of public policy which...demand an end to litigation and seek to prevent the harassment of parties." *Bates v. Devers*, 214 Va. 667, 670, 202 S.E.2d 917, 920 (1974). In the case at bar, the Court of Appeals' flat rule which permits Respondent to file a civil action in the federal court after he voluntarily and intelligently declined to invoke his constitutional rights in the state court criminal proceeding delays the end of litigation and encourages the harassment of law enforcement officers.

II. THE COURT OF APPEALS DID NOT HOLD—CONTRARY TO THE ASSERTION IN RESPONDENT'S BRIEF—THAT THE LAW OF VIRGINIA IS SETTLED IN SUPPORT OF THE NOTION THAT A GUILTY PLEA HAS NO PRECLUSIVE EFFECT IN SUBSEQUENT CIVIL ACTIONS.

Respondent's Brief represents erroneously that "the Circuit Court correctly recognized, the settled law of Virginia is that, with limited exceptions not relevant here, criminal convictions...by plea...have no preclusive effect in subsequent civil actions." (Respondent's Brief, p. 14). Actually, the Court of Appeals, not having been apprised of the *Souders* precedent, held that the "Virginia decisions to which we have been directed do not yield a definitive answer" to the narrow question of preclusion presented by the instant case. *Prosise v. Haring, supra* at 1138. The Court of Appeals investigated the "broader questions" of preclusion law in Virginia, and turned to "general principles of collateral estoppel...as a guide to Virginia's likely view were the precise question presented to its highest court...." *Id.* at 1139. The Court of Appeals again admitted, "the answer is...not definitively given." *Id.* at 1139. Nevertheless, the Court of Appeals applied a flat rule of nonpreclusion, and in so doing violated the admonition of *Kremer v. Chemical Construction*

Corp., supra at 1889, namely that "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged."

Given *Souders v. Gabrielson,* Virginia law precludes a civil suit based on § 1983 after it is demonstrated that the plaintiff had previously pleaded guilty to the crime that gave rise to the alleged violation of his civil rights. Also very troubling is the Respondent's failure to recognize the application of the landmark case of *Eagle, Star & British Dominions Insurance Co. v. Heller,* 149 Va. 82, 140 S.E. 314 (1927), to the instant case. In that case the Virginia Supreme Court departed from the rule of mutuality and held that a convicted arsonist could not recover on the insurance policy for the burned property. The case clearly stands for the proposition that the criminal defendant will not be permitted to profit from his illegal act. See also Vestal, *Restatement (Second) of Judgments, A Modest Dissent,* 66 Cornell L. Rev. 464, 482 (1981) (very strong support exists for extension of issue preclusion in cases such as those where a person pleads guilty and later sues officers who made the arrest). Similarly, Prosise is seeking to profit monetarily from the result of his admittedly illegal conduct.

In view of the departure from the mutuality doctrine in *Eagle, Star v. Heller,* under circumstances similar to the instant case, it is fair to conclude that the Virginia Supreme Court would apply preclusive effect to Prosise's guilty plea even though it might require a departure from the alleged requirement of "actual litigation."[2]

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[2]The Respondent takes the position that *Eagle, Star v. Heller,* is not helpful to the Petitioners because it concerned an example of actual litigation of the issue sought to be precluded. It should be noted that in *Ideal Mutual Insurance Co. v. Heller,* 319 N.W.2d 289 (S.Ct. Iowa, 1982), the court held that where there is an examination of the factual basis of the plea, a guilty plea satisfies the "actual litigation" requirement of issue preclusion. Thus, a convicted murderer could not recover on an insurance policy on the victim's life because his criminal act was established by his plea of guilty and the policy had an exclusion for such instances. The court relied heavily on the decision in *Prosise, supra.* The Iowa court, however, interpreted *Prosise* as establishing the principle that "incentive to litigate" is the determinative factor in issue preclusion. The Iowa court further noted that since *Prosise* involved issues other than the elements of the crime, the Iowa court would "reserve the *Prosise* question for another day." *Ideal Mutual Insurance Co. v. Winker* at 296.

If incentive to litigate is the determinative factor in issue preclusion, then the Fourth Circuit was plainly in error in the *Prosise* case; there cannot be any serious argument that Prosise did not have adequate incentive to raise the search

(footnote continued)

If nothing else, the *Souders* and *Eagle, Star v. Heller* precedents demonstrate that Virginia courts do not invoke the flat rule of nonpreclusion, which the Court of Appeals announced as one justification for reversing the federal trial court's summary judgment in favor of Respondent. Although abstention is not necessary in the instant case, the proper course of action when a Court of Appeals is uncertain[3] about the preclusive effect of state court judgments is to abstain. Abstention, however, was not invoked by the Court of Appeals. This failure seems to have been

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(footnote continues)

issue in a motion to suppress. The real reason that the Fourth Circuit adopted a rule of nonpreclusion is because to hold otherwise would cut off Prosise's access to a federal forum. *Prosise supra* at 1142.

In any event, the reasoning of the Iowa Supreme Court supports the application of preclusion to the situation in *Prosise*. Where, as in *Prosise* the trial court examines the circumstances of the search which produced the essential evidence of the crime, the requirement of "actual litigation" is amply satisfied.

[3]The Court of Appeals clearly was uncertain. The opinion admits over and over again that the precise question of preclusion before it "has not, so far as our research discloses, been authoritatively addressed by the Virginia courts." *Prosise v. Haring, supra* at 1139.

prompted by that court's distrust of the state court system and its inclination to provide Prosise with a federal forum for his claims. The Court of Appeals erroneously believed that "the 1983 federal forum is the only one available for assertion of this particular constitutional claim." *Prosise v. Haring, supra* at 1142.

III. RESPONDENT ADOPTS THE MISTAKEN PREMISE THAT ONE MUST KNOWINGLY AND INTELLIGENTLY WAIVE HIS SPECIFIC RIGHT TO FILE AN ACTION UNDER 42 U.S.C. § 1983.

Repondent asserts, "A guilty plea standing alone does not evidence...an intentional relinquishment of a statutory right to sue state agents for damages under § 1983 for antecedent constitutional violations." (Respondent's Brief, p. 27). Contrary to Respondent's assertion, an intelligent relinquishment of a known right is all that the Supreme Court requires; it does not require the curious rule proposed by Respondent, namely that one must waive his statutory rights to each and every cause of action that provides him with a particular remedy for an alleged constitutional violation. If that were the rule, an unmistakable waiver of a constitutional right would never amount to a relinquishment of statutory causes of action that pertain to the antecedent constitutional violation.

Respondent's assertion is also misleading because the instant case involves far more than a guilty plea "standing alone." A brief examination of the sentencing hearing which followed the state court's acceptance of Prosise's guilty plea shows this. (For the Court's convenience the appendix to this brief contains a portion of the transcript of the sentencing hearing. The full transcript is contained in the Record in this Court in Volume II, "Exhibit", and is labeled Exhibit F.) An attempted murder charge was "nolle prossed as a result of plea bargaining." (Appendix to this brief at page 3a.) However, following his plea of guilty and the admission of evidence which corroborated his plea of guilty, the respondent began to assert his innocence, and the trial court treated this as a motion to withdraw the guilty plea. (Appendix to this brief at pages 1a and 6a.) The respondent's action treated as a motion was then denied because the judge heard the evidence that was acquired as a result of the allegedly illegal search warrant, and was satisfied that the evidence "would have been very persuasive to a jury." (Appendix to this brief at page 1a.) Respondent then petitioned the Virginia Supreme Court challenging the voluntariness of his plea and the refusal of the trial court to permit withdrawal of the plea. Finding no reversible error, the Petition

for Appeal was refused. *Prosise v. Commonwealth*, Record No. 78-1479 (Va. S.Ct., July 17, 1979). Since this evidence was heard and was a factor that was relevant to the disposition of the motion to withdraw a guilty plea, the adequacy of the evidence was litigated as fully as Respondent desired. Respondent claimed that the evidence was inadequate to establish his guilt, but in making his argument, he and his counsel declined to assert that the search warrant which led to the seizure of the evidence was constitutionally infirm. (Appendix to this brief at pages 5a-6a. Respondent does not argue that he was inadequately represented by counsel, or that he lacked a full and fair opportunity to challenge the evidence upon which the state court relied. Moreover, Respondent has not argued in the state court, the United States District Court, the Court of Appeals, or in this Court that his failure to file a motion to exclude or to object to the evidence was not his considered choice. In short, Respondent intelligently relinquished a known constitutional right.

A plea of guilty, particularly a guilty plea that is not permitted to be withdrawn upon the basis of evidence, justifies the summary judgment entered in favor of Petitioners in this case. As this Court reaffirmed in *Tollett v. Henderson*, 411

U.S. 258, 267 (1973): "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense for which he is charged, he may not thereafter [in a collateral proceeding] raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *A fortiori*, when the accused seeks to withdraw his guilty plea but does not challenge the evidence which justifies his conviction, sentence and the denial of his motion to withdraw the guilty plea, there is in effect a deliberate bypass or a considered choice that constitutes an intelligent relinquishment of a known constitutional right under the principles of *Tollerr v. Henderson, supra* and the trilogy of cases that the Court relied on in *Tollett: Brady v. United States*, 397 U.S. 742 (1979); *Parker v. North Carolina*, 397 U.S. 790 (1970); and *McMann v. Richardson*, 397 U.S. 759 (1970).

Under these circumstances, the failure of the Court of Appeals to address the issue of intelligent relinquishment of a known right is unfortunate. The Court of Appeals confused this issue with the collateral estoppel issue. *Prosise v. Haring, supra* at 1136-1137. This confusion was a mistake of law, and is in conflict with the Fourth Circuit's own decision of *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) *(per curiam)*. In-

credibly, the Court of Appeals suggests that Respondent Prosise lacked incentive to object to the search warrant in the instant case because of his desire to raise the point in federal court. Petitioners believe, with Justice Stewart, that "it is difficult to imagine a defendant risking conviction and imprisonment because he hoped to win a later civil judgment based upon an allegedly illegal search and seizure." *Allen v. McCurry, supra* at 104, n. 23. If we speculate along with the Court of Appeals and suppose Respondent made this considered choice, his deliberate bypass is an abuse of process that would justify a federal court's refusal to hear his § 1983 claim on the merits. The more likely explanation is that Respondent's failure to invoke his constitutional rights was initially motivated by his hope "to take the benefits, if any, of a plea of guilty...." *McMann v. Richardson, supra* at 768. When these benefits proved to be unsatisfactory, it was still open to Respondent to establish that his guilty plea was not a constitutionally valid waiver, and that he did not deliberately by-pass the orderly processes provided to determine the illegality of the search. Respondent, however, also relinquished this right, having failed to object to the evidence relied upon by the state court when his motion to withdraw the guilty plea was denied.

Under these circumstances, Respondent's argument that there must be a specific waiver of his right to file a § 1983 action is particularly unpersuasive.

CONCLUSION

The overriding issue of policy in this case is whether a person convicted of a serious crime by his plea of guilty who did not invoke his constitutional rights during the state court proceeding, is entitled to a decision from this Court that would allow him money damages. There is nothing unconstitutional about a common sense rule of judicial administration that prevents the confessedly guilty from manipulating the general rules provided for his protection in order to obtain money damages. One collateral consequence of the Respondent's guilty plea to manufacturing PCP should be his disqualification from utilizing 42 U.S.C. § 1983, especially after he deliberately by-passed the orderly procedures provided by state courts for protecting his constitutional rights. A rule that encourages felons seeking money damages to by-pass these procedures is not the product of an enlightened jurisprudence.

To reward convicted drug merchants who want their plea bargain and money damages too offends both common sense and the moral sense

on which the Constitution is based. There is no reason to adopt a flat rule of nonpreclusion, as the Fourth Circuit did, simply because the exclusionary rule may be considered offensive. By proposing a flat rule of nonpreclusion while the exclusionary rule continues in effect, the Respondent is proposing to use 42 U.S.C. § 1983 to upset the constitutional balance "which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." *Poe v. Ulman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). A novel case ruling that encourages actions for windfall damages by those who break the law and abuse the process provided by the states clearly is not required by any traditional understanding of the due process of law concept. What is due is what is fitting and appropriate. Traditional and reasonable expectations of privacy are not violated by a rule of judicial administration that prevents the criminal from increasing his wealth because a policeman may have made a mistake which was not challenged by its alleged victim at a crucial stage of the events following the policeman's action. In sum, Section 1983 should not be reformulated in order to

provide a remedy for duly convicted felons inconsistent with the view that they have been duly convicted.

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SENTENCING HEARING TRANSCRIPT

June 15, 1978

(Begin Transcript page 12)

THE COURT: I will treat this as a motion made by the defendant pro se for the right to withdraw his plea of guilty and reinstate a plea of not guilty. The motion is denied. A great deal of time was devoted to taking the plea in this case. I remember it very distinctly. I think the Court went farther than is the custom in order to be sure the plea was voluntarily made and that the Commonwealth (Begin Transcript page 13) had a good strong case that formed the factual basis for the plea. It was quite clear if the defendant had been exposed to trial he would have been convicted by a jury. The defendant in those circumstances, fully understanding where he stood, elected to take his chances with sentencing by the Court rather than sentencing by the jury.

I see by his pre-sentence report that he contends there are weaknesses in the Commonwealth's case but I heard enough of the Commonwealth's case to satisfy myself that it would have certainly gotten by a motion to strike and in my mind it would have been very persuasive to a jury — the motion is denied.

Do you wish to call any witnesses in the defendant's behalf?

MR. RODWAY: No, Your Honor.

THE COURT: Is there anything you wish to say before sentencing?

MR. RODWAY: Your Honor, Mr. Prosise has exercised those rights that the Constitution of the United States and Virginia have given to him. I think he is pretty much on the money, Your Honor, in his analysis of the case. There are certain things which Your Honor will remember without it being pointed out in the pre-sentence report. That is while (Begin Transcript page 14) there was apparently a small amount of PCP that was manufactured, there is no real evidence that the defendant had manufactured it. There was a small amount of PCP which was found lying around the house or the apartment which was the basis of the possession of PCP; the chemicals which were there were apparently, obviously to be used in the manufacturing of PCP but apparently they had not gone through the entire process because as I remember Investigator Allen indicating that there was one chemical missing so this particular batch could never have been made.

Mr. Prosise in his discussion with the probation officer I think very candidly told her he had tried to make it before but what he turned out before had been garbage. On a scale of one to a

hundred, Your Honor, I don't know if that rings in at about seventy-five, eighty-five or ninety percent. I am not so brazen as to say that. I would ask the Court after hearing what Mr. Prosise had to say this morning and after reading the presentence report, to treat this in terms of sentencing, as an attempted manufacture of PCP.

Your Honor, the facts that are there are indicative of that. It is also, Your Honor, if you want to go across the line and it is very easy to go across the line, it is (Begin Transcript page 15) indicative of perhaps the manufacturing of PCP.

MR. RODWAY [defendant's counsel]: In terms of sentencing, Your Honor, I would ask the Court not on what he has said this morning but in terms of his lack of prior record, in terms of any criminal offenses, the only thing that he was convicted of in the past, Your Honor, was a matter in Falls Church; a matter that arose contemporaneous with this charge, an incident which involved his wife. He pled guilty downstairs to the discharging of a firearm, was given a $200.00 fine suspended.

The attempted murder charge, Your Honor, which sprang from his fight which his wife was nolle prossed as the result of plea bargaining. There is no question in this day and age the drugs

involved is a serious drug. It is a bad drug. My contact with individuals who are self-professed users of this drug would indicate that their brains are probably analogous to Swiss cheese in terms of the holes that the PCP put into their brains but once again, Your Honor, this young man stands before the Court as a first time convicted felon. He stands before the Court as an individual by his own admission feels that he has something to offer to society and I would ask the Court to treat this as if he had been found guilty of attempted manufacture of PCP rather than manufacturing of (Begin Transcript page 16) PCP. I don't know if it makes any difference but the upper end of the penalty scale is still ten years and the bottom end is a whole lot less than five years - thank you.

THE COURT: Mr. Carp?

MR. CARP [Assistant Commonwealth's Attorney]: If it please the Court, I certainly don't have to rehearse here the dangers of PCP. It is becoming more and more of a problem in this area. The reason it is becoming more and more of a problem is because of people like the defendant. We're not talking about somebody who is making a little bit for his own use but people who are manufacturing this in four pound lots. I understand the wholesale value of that amount is over $5000. We are not talking about some kids playing with a chemistry set in the backyard.

Incidentally, the question of whether or not he manufactured as I mentioned before the testimony at the previous hearing was that there was PCP in a bucket, buckets which were used for the attempt. Either he manufactured PCP or bought it someplace and smeared the inside of the bucket and the latter explanation is absurd.

With regard to his attitude, I think that is proper consideration for the Court at this time. I would like to quote from his statement, not all chemicals were mine, (Begin Transcript page 17) but half were. I had a partner that knew how to make it good. I am taking the rap because I believe in doing unto others as you would have them do unto you. His attitude at this point seems to be, at least with regard to the community, what he wants to do unto the community is to provide them with PCP. His partner is still out there, still out there with the formula and presumably is still out there manufacturing it and the defendant's attitude, he is going to stand before this Court and say I think it is right to protect that man.

I think that is best an illustration I can give to the Court why he should be sentenced to more than the minimum in this case and significantly more and I would ask the Court to do so.

THE COURT: Do you wish to say anything before sentence is imposed?

THE DEFENDANT: Yes sir, I would still like to claim my innocence, Your Honor, in the manufacturing myself of PCP. As the Commonwealth Attorney has stated, it was in my diary. That diary was written six months before I was arrested. In that diary it also stated that I wanted the chemicals to go to Houston and to have PCP made. It wasn't for me to make it. It was in there that I couldn't make (Begin Transcript page 18) first step crystals. The Commonwealth went to Maryland. They got the receipts from my apartment to prove all the chemicals I ever bought. I had never bought enough chemicals to make the first step crystals. They had enough evidence to prove I could make the finished product at one time. If they went to the receipts, they would know I never bought a chemical called pepperdene — I never had enough chemicals to manufacture the first step crystals. They could prove that themselves and I also I never had at one time — I never had enough chemicals to manufacture the second step. I still claim my innocence of manufacturing phencyclidine on or about the 7th day of September, 1977.

THE COURT: You may stand, please.

The legislature has provided a penalty range from five to forty years for this offense. To my mind the seriousness of it puts it near the upper end of that scale. The defendant is young. He has a full page of criminal record in Virginia, not very serious but his calloused attitude toward what is going to happen to the rest of society as the result of his activity. His only apparent interest is how he can assert technicalities to get him out of here. He is already talking about what appeals he is going to file. He has not shown the slightest (Begin Transcript page 19) desire to cooperate with the law enforcement authorities to assist in stamping out this evil. He is distributing a poison that in my personal experience has destroyed the lives of many young people. His only motivation for doing it was obviously to make money. He has apparently been making money at this for some time. He has not been gainfully employed for a long period of time.

The Court imposes a sentence of 25 years in the State penitentiary. The defendant is remanded to custody of the sheriff. Also a fine of $1000.00.

(Whereupon, at 11:30 a.m., the hearing was concluded.)

Supreme Court, U.S.
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No. 81-2169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GILBERT A. HARING, et al.,

Petitioners,

—v.—

JOHN FRANKLIN PROSISE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to the protection of the civil rights and liberties of Americans. Since its founding in 1920, one of the constant concerns of the ACLU has been the need to provide adequate legal mechanisms to protect against and remedy violations of constitutionally protected rights. Foremost among those mechanisms are the sanctions available under § 1983 against those state officials who abuse the official power entrusted to them.

The ACLU has frequently appeared before this Court in support of the historic role of 42 U.S.C. § 1983 in remedying violations of federal civil rights, and in deterring departure from constitutional standards.

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*Letters of consent to the filing of this brief are being lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

STATEMENT OF THE CASE

Amicus relies on the Statement of the Case set out in Brief for Respondent.

SUMMARY OF ARGUMENT

Petitioners, police officers sued under § 1983 for violating respondent's Fourth Amendment rights, contend that the principle of collateral estoppel (issue preclusion) codified in 28 U.S.C. § 1738 shields them from liability even though (1) the respondent pleaded guilty in state court; (2) he never presented the search and seizure issue to the state court; (3) the state court did not expressly consider the search and seizure issue; and (4) this Court's decisions make certain that the issue was not implicitly decided[1] since (a) there are myriad reasons why defendants plead guilty;

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1. See infra at 19-26.

(b) an intelligent guilty plea is not logically inconsistent with antecedent constitutional violations; and (c) Fourth Amendment issues are entirely unrelated to guilt.

Petitioners' underlying premise -- that the § 1983 action here is designed to and inevitably would undermine the finality of respondent's conviction -- is mistaken, since his damage claim is in fact wholly independent, and does not seek any damages arising from his conviction. Although the Court has held that a valid guilty plea is not generally vitiated by antecedent constitutional violations, e.g., Tollett v. Henderson, 411 U.S. 258 (1973), it has never indicated that such violations are "waived" by the plea, or that they cannot serve as the basis for § 1983 damage actions, so long as recovery is not predicated on the conviction or any of its consequences.

Nor do principles of collateral estoppel applicable through 28 U.S.C. § 1738 preclude respondent's damage claim. If the proper measure of estoppel is Virginia law, as suggested by Kremer v. Chemical Construction Co., 72 L.Ed.2d 262 (1982), then the Fourth Circuit's reading of Virginia law, authoritative under the circumstances here presented, makes clear that respondent's guilty plea does not preclude litigation of the Fourth Amendment issues raised here.

If general principles of collateral estoppel are relevant, estoppel is improper because it applies only to issues actually litigated, and no issues are litigated by a guilty plea. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 157 (1962) (dictum). Moreover, even if, contrary to this Court's repeated suggestion, a guilty plea could estop relitigation of elements of the crime charged, preclusion

would still be improper, because the Fourth Amendment issues raised in respondent's damage claim are entirely unrelated to factual guilt, Stone v. Powell, 428 U.S. 465 (1976), and were neither actually nor necessarily determined by his guilty plea. See Brady v. United States, 397 U.S. 742 (1970); Tollett v. Henderson, supra.

Finally, if the Court is free despite § 1738 to apply any version of collateral estoppel other than that contained in Virginia law or general principles, considerations of sound policy concerning the criminal justice system, § 1983, and enforcement of the Fourth Amendment all strongly suggest that preclusion is improper here.

ARGUMENT

I. A § 1983 DAMAGE CLAIM IS NOT A DEVICE TO ATTACK A CONVICTION COLLATERALLY AND IS NOT WAIVED BY A GUILTY PLEA

Petitioners' entire argument rests on an incorrect assumption which is best put to one side at the outset, namely that respondent's § 1983 damage action is intended to attack the validity of his conviction collaterally, or that it would inevitably call that conviction into question. Petitioners' suggestion that the Fourth Circuit's decision will encourage defendants to undermine the state's legitimate expectation of finality in convictions by permitting defendants to recover damages for incarceration resulting from Fourth Amendment violations is unfounded and illusory.

We do not understand either the court below or respondent here to disagree that § 1983 is unavailable as a device for state prisoners to challenge their convictions, either directly or indirectly.

"Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity or fact or length of their confinement and that specific determination must override the general terms of § 1983." Preiser v. Rodriguez, 411 U.S. 475, 490 (1973). Since § 1983 is unavailable to challenge the fact of confinement to secure release from custody, it follows inescapably that § 1983 is also unavailable to seek damages resulting from continued confinement.[2] The damage action involved in this

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2. A voluntary and intelligent guilty plea constitutes a defendant's consent to judgment of conviction. Brady v. United States, 397 U.S. 742, 748 (1970). This consent precludes the assertion of a damage claim resulting from the fact of conviction, and any attempt to measure damages by any of the consequences of conviction, and we are in agreement with petitioners to that extent. See Br. for Pet. at 15 n.5. In addition, of course, as petitioners observe, basing damages on conviction would implicate concerns of comity, since the federal judgment would (footnote continued on following page)

case, however, does not violate that principle.

(footnote continued from preceding page) be an implied rebuke to the state judgment. But as we show infra at 19-26, a § 1983 judgment is not inconsistent with the guilty plea, and implicates no concerns of comity, where, as here, the damages do not include conviction and its consequences.

Of course substantial damages must still be made available in these circumstances, and would include meaningful compensation in recognition of the magnitude of the personal interests trammeled by violation of the Fourth Amendment right itself, see Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 408-09 & n.9 (1971)(Harlan, J., concurring), Monroe v. Pape, 365 U.S. 167, 196-97 (1961)(Harlan, J., concurring); damages for mental and emotional distress caused by denial of the right, see Carey v. Piphus, 435 U.S. 247, 263-64 (1978); damages for actual physical and property injuries suffered in the course of the illegal search and seizure; and punitive damages for willful, malicious or reckless conduct, see Carey, 435 U.S. at 257, n.11. See, e.g., Smith v. Heath, 691 F.2d 220 (6th Cir. 1982).

Contrary to petitioners' ill-founded argument, respondent's § 1983 action had quite a different purpose than collateral attack of his conviction, namely compensation for and deterrence of constitutional violations. See, e.g., Carlson v. Green, 446 U.S. 14 (1980); Monroe v. Pape, 365 U.S. 167, 172-187 (1961). Just as the actions for which respondent seeks redress are antecedent to the criminal proceedings leading to his conviction, those goals are quite independent of the disposition of the charges lodged against him. Indeed, members of this Court have stressed the value of the damage remedy for Fourth Amendment violations precisely because it is independent of criminal proceedings and available not only to the guilty but to both innocent and guilty alike. See, e.g., Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 410 (1971)(Harlan, J., concurring).

Accordingly, petitioners' reliance on cases involving collateral attacks to the validity of guilty pleas to support the proposition that guilty pleas constitute a waiver of § 1983 Fourth Amendment claims (Pet.Br. 27-36) is wholly misplaced. In Tollett v. Henderscn, 411 U.S. 258, 266-67 (1973), this Court merely held that after a defendant pleads guilty "claims of prior constitutional deprivation ... are not themselves independent grounds for federal collateral relief." (Emphasis added.) Accord, Menna v. New York, 423 U.S. 61 (1975). Although "a person complaining of such 'antecedent constitutional violations' is limited in a federal habeas proceeding to attacks on the voluntary and intelligent nature of the guilty plea", Blackledge v. Perry, 417 U.S. 21, 30 (1975)(citations omitted)(emphasis added), Tollett and its progeny do not hold that such antecedent violations are waived by a plea of guilt,

especially when they are antecedent to the criminal trial and collateral to it.[3] Since respondent here is not seeking to attack his conviction, or indeed seeking any relief inconsistent with the validity of that claim, Tollett and Menna are plainly inapposite, as the Fourth Circuit

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3. Petitioners' reliance on Tollett and Menna to support their contention that respondent waived his Fourth Amendment claim is particularly inappropriate because even in the limited context of determining the scope of collateral attacks on guilty pleas, the Court explicitly disclaimed reliance on waiver concepts, holding instead that a guilty plea was a "break in the chain of events which preceded it in the criminal process" precluding the plea from being judged as illegal fruit of prior unlawful official acts. See Tollett, 411 U.S. at 266; Menna, 423 U.S. at 62 n.2. Under well established doctrine "a waiver is an intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1983). A defendant's mere guilty plea (or decision not to object to the admission of illegally seized evidence, see n.4 infra) cannot under any stretch of the imagination be deemed an intentional relinquishment of the right to assert Fourth Amendment claims through § 1983.

correctly realized. 667 F.2d 1133, 1136 (4th Cir. 1982).[4]

II. RESPONDENT'S § 1983 DAMAGE CLAIM IS NOT PRECLUDED BY 28 U.S.C. § 1738 AND THE PRINCIPLES OF COLLATERAL ESTOPPEL WHICH IT CODIFIES

It is common ground that this case is governed at least in part by 28 U.S.C. § 1738, which "specifically require[s] all federal courts to give state court judgments preclusive effect whenever the

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4. Amicus believes that the Fourth Circuit's per curiam opinion in Cramer v. Crutchfield, 648 F.2d 943 (4th Cir. 1981), distinguished in Prosise, was incorrectly decided. In Cramer, the circuit without reasoning or discussion of applicable waiver principles held that a defendant's failure to object to the admission of illegally seized evidence in criminal proceedings constituted a waiver of subsequent § 1983 Fourth Amendment claims. In our view, a § 1983 damage claim based on illegal search and seizure where damages are not based in any way on subsequent conviction is no more barred by a conviction than by a guilty plea, so long as the search and seizure issue was not presented or decided in the criminal case.

Courts of the State from which the judgment emerged would do so." Allen v. McCurry, 449 U.S. 90, 96 (1980). The preclusive effect actually to be accorded the Virginia judgment here might be measured in three ways: (1) by Virginia law, under § 1738; (2) by Virginia law under § 1738 and, in addition, by the general principles of collateral estoppel which federal courts have formulated in considering federal judgments; and (3) by Virginia law and general principles, together with such modifications or exceptions as might be warranted in light of the circumstances presented, here a Fourth Amendment claim which was not raised in criminal proceedings concluded by a guilty plea.[5]

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5. In Allen, this Court did not determine how collateral estoppel should apply in federal courts considering the effect to be given state decisions. 449 U.S. at 93 n.2, 105 n.25. It therefore did not
(footnote continued on following page)

As we now show, respondent's guilty plea should not be precluded under any of these approaches.

A. Virginia Doctrine Of Collateral Estoppel Does Not Bar Respondent's Damage Claim

The Fourth Circuit comprehensively canvassed the Virginia law of collateral estoppel and properly determined that Virginia would grant no preclusive effect to respondent's conviction in a subsequent § 1983 action based on an unlawful search

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(footnote continued from preceding page) determine whether in considering a state judgment § 1738 limits federal courts to considering only the preclusive rules of the rendering state, an approach possibly relied on in Kremer v. Chemical Construction Co., 72 L.Ed.2d 262, 271 (1982) or permits consideration of general principles of collateral estoppel. See Montana v. United States, 440 U.S. 147 (1979) (analyzing preclusive effect of state judgment only under general principles, without addressing state law). Amicus suggests that this issue need not be decided here since, for the reasons presented infra, preclusive effect would not be warranted in either event.

which had not been placed at issue. 667 F.2d 1138-39.[6] Nothing in petitioners' discussion of Virginia law suggests that the Fourth Circuit erroneously interpreted Virginia law. In any event, this Court's customary deference to interpretation of state law by lower federal judges who have practiced locally and are versed in such law requires, in these circumstances, that it decline petitioners' invitation to redetermine Virginia law for itself. See Bishop v. Wood, 426 U.S. 341, 345-47 (1976).

B. General Principles Of Collateral Estoppel Only Preclude Relitigation Of Issues Actually Or Necessarily Determined In A Prior Proceeding

The conventional principles of preclusion recognized by this Court and commentators involve the related doctrines of

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6. The district court found it unnecessary to inquire into state law based on its different view of this case.

res judicata and collateral estoppel.[7] "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979); see Allen v. McCurry, 449 U.S. at 94; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Allen

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7. The Restatement refers to res judicata as claim preclusion and collateral estoppel as issue preclusion. Restatement of the Law of Judgments (Second) (1982) at 131. See generally Allen v. McCurry, 449 U.S. at 94 n.5; Kremer v. Chemical Construction Co., 72 L.Ed.2d at 280.

v. McCurry, 449 U.S. at 94; Montana v. United States, 440 U.S. at 153.

Unlike the broader res judicata doctrine, which is not at issue here,[8] the

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8. Petitioners' attempt to rely on res judicata and its principle of bar (Pet. Br. 22-23), in addition to collateral estoppel, is without merit. First, it is our understanding that the lower courts were presented only with a claim of collateral estoppel. More fundamentally, res judicata does not apply in these circumstances, as this Court recognized in Allen v. McCurry, 449 U.S. at 92 n.2, 105 n.25 (leaving to lower courts application of collateral estoppel principles to facts of case), Wooley v. Maynard, 430 U.S. 705 (1977)(deciding affirmative challenge to state statute notwithstanding prior convictions for violating same statute), and Ellis v. Dyson, 421 U.S. 476 (1975)(same). See also Montana v. United States, 440 U.S. at 154. Res judicata is claim preclusion, but respondent could not have included a damage claim in his criminal case. In addition, under standard doctrine, res judicata cannot apply where, as here, the party asserting the res judicata defense was not a party to the earlier action or in privity with a party. See generally Montana v. United States, 440 U.S. at 154 n.5 and authorities cited therein. Southern Jam, Inc. v. Robinson, 675 F.2d 94 (5th Cir. 1982), relied on by petitioners (at 22), is not to the contrary, since there the parties to the state civil action and the subsequent federal action were identical.

collateral estoppel doctrine applies "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered .... The parties are free to litigate points which were not at issue in the first proceeding even though such points might have been rendered and decided at that time." Commissioner v. Sunnen, 333 U.S. 591, 598 (1947).

The collateral estoppel doctrine serves a number of important purposes: it promotes judicial economy by reducing unnecessary litigation; fosters reliance on adjudication by preventing inconsistent decisions; and where federal courts give proper preclusive effect to state court decisions, promotes comity between state and federal courts. See Allen v. McCurry, 449 U.S. at 94.

1. A Guilty Plea Has No Collateral Estoppel Effect On Any Issues Since None Has Been Actually Litigated Or Necessarily Decided

In the context of criminal judgments it is reasonably well established that "a prior criminal conviction may work an estoppel in favor of the government in a subsequent civil proceeding." Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951); Frank v. Mangum, 237 U.S. 309, 334 (1915). However, "such estoppel only extends to matters distinctly put in issue and directly determined in the criminal prosecution." Emich, 340 U.S. at 569; Frank, 237 U.S. at 334.

Although this Court has never decided the precise estoppel effect of guilty pleas, it has suggested, with others, that a guilty plea has no collateral estoppel effect on any issues since none has been

actually litigated.[9] That suggestion has ripened into sound law, we believe, with this Court's decisions concerning plea

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9. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 157 (1962)(the fact that the defendant pleaded guilty to draft evasion "in itself may support the conclusion that his citizenship status was not litigated and thereby without more preclude his assertion of estoppel ... "); Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 441 (1962)(Traynor, J.)("When a plea of guilty has been entered in the prior action, no issues have been drawn into controversy by a full presentation of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for expeditious administration of criminal justice combine to prohibit the application of collateral estoppel against a party who having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action")(citations omitted). See generally 18 A.L.R. 2d 1287, 1311 (1951); cf. Ellis v. Dyson, 421 U.S. 476 (1975)(deciding affirmative challenge to state statute notwithstanding prior nolo plea to violation of statute); Lawlor v. National Screen Service Corp., 349 U.S. 322, 326-27 (1955)(denying collateral estoppel effect to judgment based on the parties' consent and unaccompanied by findings); United States v. International Building Co., 345 U.S. 502, 506 (1952)(same).

bargaining in the Brady trilogy[10] and North Carolina v. Alford, 400 U.S. 25 (1971). In Brady, this Court stressed that a defendant might intelligently plead guilty for any number of reasons, some bearing on factual guilt and some quite unrelated to it.[11] In Alford, the Court held that a court could accept a guilty plea even from a defendant who denied his factual guilt, reasoning that there are

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10. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

11. "For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas ... "
397 U.S. at 750.

myriad factors and pressures which might lead even an innocent defendant voluntarily and intelligently to condemn himself and accept a bargained disposition.[12] This Court's realistic understanding in those cases of the myriad non-guilt-related reasons which may validly induce a guilty plea is wholly inconsistent with petitioners' mechanical equation of a guilty plea with confession of factual guilt of each element charged. A defendant who pleads guilty accepts the consequences of his plea insofar as a judgment of conviction and its attendant criminal

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12. The following passage quoted approvingly by the Court had presaged its opinion in Alford by a century:

> "Reasons other than the fact that he is guilty may induce a defendant to so plead ... [and] [h]e must be permitted to judge for himself in this respect."

Alford, 400 U.S. at 33 quoting Iowa v. Kaufman, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879).

penalties is concerned; but he is neither advised of nor can he be thought to accept collateral civil consequences at the hands of private litigants with whom he has not engaged in the give and take of a bargain. Accordingly, this Court should reject what the Fourth Circuit saw as "emerging doctrine" in some circuits permitting collateral estoppel, or something quite like it, on issues that are elements of the crime. See Prosise v. Haring, 667 F.2d 1133, 1140 (4th Cir. 1982).

2. Even Assuming Arguendo That A Guilty Plea Has Collateral Estoppel Effect On Issues Related To The Elements Of The Crime, Fourth Amendment Issues Are Entirely Unrelated To Factual Guilt And Are Neither Actually Nor Necessarily Determined Through A Guilty Plea.

Even if Brady and Alford did not foreclose adoption of an "emerging doctrine" under which guilty pleas can estop relitigation of elements of the crime, collateral estoppel would still be unavailing here. While a defendant's guilty plea

might "remove[] the issue of factual guilt from the case", Menna 423 U.S. at 62-63 n.2, issues unrelated to factual guilt or innocence are neither actually nor necessarily determined through an admission of guilt. Tollett v. Henderson, supra (valid acceptance of guilty plea not logically inconsistent with antecedent constitutional violations); see also Menna v. New York (same).

Although the Tollett doctrine arose in the context of antecedent constitutional violations that were part and parcel of the criminal justice process, and that had some bearing on questions of guilt or innocence, its rationale would seem to apply a fortiori to unrelated antecedent violations with no such bearing, like the Fourth Amendment violation here. This Court has repeatedly recognized that

Fourth Amendment claims are entirely unrelated to the fact finding process. See Stone v. Powell, 428 U.S. 465, 474 (1976); Linkletter v. Walker, 381 U.S. 618, 638 (1965). "Rather, the protections of the Fourth Amendment are of a wholly different order and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." Schneckcloth v. Bustamonte, 412 U.S. 218, 242 (1973).

Again, this Court's understanding in Brady that "[f]or some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment", 397 U.S. at 750, is inconsistent with the view that any defendant who had a Fourth Amendment claim would choose to raise it at trial rather than foregoing it in a plea bargain. A defendant may, like Raskolnikov in Crime and Punishment, choose to accept his

guilt. The plea may be more attractive than the prospects of criminal trial and probably enhanced punishment. The Fourth Amendment claim, while valid, may not be likely to avoid conviction in light of other evidence. In short, there is simply no reason for believing that a guilty plea is inconsistent, as a matter of logic or human behavior, with an antecedent Fourth Amendment violation. Accordingly, a guilty plea could not estop a defendant's subsequent assertion of Fourth Amendment claims in a related damage action, even if it could estop relitigation of elements of the crime.

C. Application Of Collateral Estoppel To Preclude § 1983 Fourth Amendment Claims Never Before Raised Is Unsupported By Any Sound Policy Considerations.

Whether preclusive effect is measured by state law, see Kremer v. Chemical Construction Co., supra, or general princi-

ples, see Montana v. United States, supra, it seems settled that there is no room in § 1983 cases for preclusion rules more rigorous than those ordinarily used. See Allen v. McCurry, 449 U.S. at 95 n.7. Since under neither approach is preclusion permissible under the circumstances of this case, analysis of the policy considerations preclusion would raise would appear unnecessary and inappropriate. Nevertheless, if those policies are relevant at all, it is apparent that they strongly militate against preclusion, whether approached from the standpoints of the criminal justice system, the Fourth Amendment, or § 1983.

First, since as noted in Point I, supra, § 1983 is not a device to attack guilty pleas collaterally, preclusion is not necessary to avoid undermining the finality of convictions. Moreover, where the state criminal court has simply not

been presented with or adjudicated the Fourth Amendment issues, a subsequent § 1983 action would not generate or indicate any disrespect for state judgments, or disrupt the comity between federal and state courts.

Moreover, from the standpoint of the criminal justice system, the guilty plea and the often concomitant plea bargaining are important components. "Properly administered they can benefit all concerned." Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978). A rule holding that guilty pleas preclude assertions of civil damage claims might discourage some defendants -- particularly those subject to the most outrageous illegal searches or seizures -- from accepting guilty pleas, and thereby reduce the voluntary and proper reliance on the plea bargaining process.

On the other hand, precluding the

assertion of § 1983 Fourth Amendment claims which could have been the basis of motions to suppress[13] would undermine several important policies inherent in § 1983 and the Fourth Amendment. Section 1983 damage actions serve to compensate persons injured by deprivation of federal rights and to prevent abuses of power by state officials. Robertson v. Wegmann, 436 U.S. 584, 591 (1978). Indeed, "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional liberties," Owen v. City of Independence, 445 U.S. 622, 651 (1980). Applying collateral estoppel in this context would defeat the compensatory and deterrent

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13. We note that a substantial number of Fourth Amendment claims could not be subject to related motions to suppress, and therefore could not be precluded under any theory, unless the purpose of preclusion is additional punishment. See United States v. Crews, 445 U.S. 463 (1980); Frisbie v. Collins, 342 U.S. 519 (1952).

policies underlying § 1983 and subvert vindication of the Fourth Amendment.[14] "It is almost axiomatic that the threat of damages has a deterrent effect ... surely particularly so when the individual officer faces personal financial liability." Carlson v. Green, 446 U.S. 14, 21 (1980). Since, judging from reported cases, no constitutional norm would appear to be more massively and flagrantly violated than the Fourth Amendment, removing the substantial deterrent effect of damages is insupportable.

Apart from § 1983, the exclusionary rule provides the only other means of effectuating the rights secured by the Fourth Amendment. However, "the rule

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14. In City of Newport v. Facts Concert, Inc., 453 U.S. 247, 267 (1981), this Court articulated an additional policy served by § 1983 actions -- retribution of constitutional violaters. This policy would also be frustrated by the unnecessary preclusion of § 1983 claims.

is calculated to prevent, not repair", Elkins v. United States, 346 U.S. 206, 217 (1960), and its application is "unsupportable as reparation or compensatory dispensation to the injured criminal", Stone v. Powell, 478 U.S. at 476 n.24, quoting Amsterdam, Search, Seizure and Section 2255: A Comment, 112 U.Pa.L.Rev. 378, 388-89 (1964). Holding § 1983 damage claims precluded by guilty pleas (and, presumably by convictions) would thus eliminate the only remedy designed to compensate victims of illegal searches and seizures, where those victims are found guilty in related criminal proceedings.

The petitioners' suggested rule of preclusion would undermine an additional consideration underlying § 1983: the policy in favor of providing a federal forum for determination of federal constitutional rights. This Court has repeatedly acknowledged "the paramount

role Congress has assigned to the federal courts to protect constitutional rights." Steffel v. Thompson, 415 U.S. 452, 472-73 (1974). See, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). Although con-congressional recognition of the primacy of federal courts as guardians of federal civil rights is not a justification for inferring an intent to override the application of settled conventional collateral estoppel principles, see Allen v. McCurry, 449 U.S. at 98-99, it is still a significant consideration mitigating against the unwarranted and unnecessary extension of preclusion principles beyond the traditional extent determined by Congress in 28 U.S.C. § 1738.

Nor is the possibility of increased frivolous litigation a justification for using preclusion to thwart the vindica-

tion of constitutional liberties.[15] As in cases involving far less substantial interests, Rules 12 (b) and 56 of the Federal Rules of Civil Procedure provide adequate methods of screening groundless lawsuits.

Finally, we note that sound policy considerations strongly argue against a collateral estoppel rule that looks to each defendant's incentive to have raised the Fourth Amendment issue in the prior criminal proceeding. Such a rule would undermine all of the important policy considerations previously mentioned. In addition, the rationalization for such a rule proceeds on the incorrect assumption that defendants only plead guilty

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15. None of the statistics presented by amici in support of petitioners indicates anything whatsoever concerning groundless Fourth Amendment claims asserted after guilty pleas. In any event, Congress has already devised a non-judicial procedure for resolving many of the cases over which amici are so alarmed. See Patsy v. Board of Regents, 73 L.Ed.2d 172, 182-85 (1982).

out of fear of conviction at trial. For those who, as the Brady Court understood, merely choose to accept their guilt, or who plead guilty for other reasons among the myriad factors motivating guilty pleas, see supra at 19-26, the incentive to have raised the Fourth Amendment issues in prior criminal proceedings is irrelevant. Moreover, the additional judicial proceedings required even to attempt to ascertain 1) that a defendant's reason for pleading guilty was fear of conviction at trial; and 2) that such fear would not have motivated a guilty plea, in the absence of the illegally seized evidence, would subvert the primary policy underlying the collateral estoppel doctrine -- judicial economy.

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the judgment

of the Court of Appeals below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GILBERT A. HARING, Lieutenant,
Arlington County Police Department, et al.,
Petitioners,

vs.

JOHN FRANKLIN PROSISE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE GULF AND GREAT PLAINS LEGAL FOUNDATION OF AMERICA, INC., AND THE VIRGINIA CHAPTER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Charles G. Flinn, Arlington County (Va.) Attorney, Counsel for Petitioners, and Norman A. Townsend, Esq., Counsel for Respondent. Letters of Consent of both parties are being filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more

effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* forty-five times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Gulf & Great Plains Legal Foundation of America, Inc. (GGP), is a non-profit, tax-exempt corporation, supporting the operations of a public interest law firm. It functions nationwide, although its efforts are concentrated most heavily in the states of the gulf coast and great plains regions. All litigation undertaken by GGP is approved by its Board of Directors, who are attorneys and businessmen or women, residing throughout this midwestern area.

Among other goals, GGP seeks to preserve a rational, workable criminal justice system and an appropriate constitutional balance between the Federal Government and the states. In pursuit of these goals, GGP has appeared as *amicus curiae* in the Supreme Court of the United States, the Federal District Courts, in the Circuit Courts of Appeal, and in various state courts. GGP supports the right to bring civil rights actions in proper circumstances. Indeed, GGP has *itself* brought actions pursuant to § 1983. However, the proliferation of

unmeritorious actions has reached a point at which GGP believes it detracts seriously from the ability of both the federal courts and criminal justice system to perform their functions properly.

The Virginia Chapter of Americans for Effective Law Enforcement, Inc., is a not-for-profit citizens organization with objectives and goals similar to those of the parent organization, **AELE.** In addition, the **Virginia Chapter** provides speakers for civic organizations, addresses issues in the media, and most recently, sponsored a state-wide conference on sentencing in conjunction with the Virginia State Crime Commission.

Amici's interest arises from the important constitutional and policy questions pertaining to police activity in general, and in particular the type of activity involved in the instant case. We are vitally concerned with the issue of finality in Fourth Amendment claims and the need to protect law enforcement officers and the courts from the large number of groundless civil actions they will face as a result of the decision of the Fourth Circuit Court of Appeals in *Prosise* v. *Haring*, 667 F. 2d 1133 (4th Cir. 1982). It is our belief that it is desirable to fully explore and discuss the legal and policy issues of interest to law enforcement agencies, and that the full airing of the issues will aid the court in understanding the critically important law enforcement interest in this case and in putting all of the issues into the broadest possible perspective.

We stress also that our law abiding citizens have much at stake in this case, involving as it does the ability of the police to carry out their function without the constant threat of being mulcted in damages by prisoners filing *pro se* suits months or years after the complained-of conduct, and *after* the constitutional claims *could have been litigated* in a full and fair hearing in a state court. If the police are to be called upon to protect the public and themselves, they must be protected from the ever-present spectre of frivolous and harassing law suits in performing their sworn duty. They cannot be expected to

constantly keep their eyes on the possibility of lawsuits while attempting to perform their duty, otherwise it would be futile to expect them to effectively perform that duty.

The policeman's role is vital to the security of a Free Society as noted in the *President's Commission on Law Enforcement and Administration of Justice*, 92, 94 (1967):

> In society's day-to-day efforts to protect its citizens from the suffering, fear, and property loss produced by crime and the threat of crime, the policeman occupies the front line. It is he who directly confronts criminal situations, and it is to him that the public looks for personal safety. The freedom of Americans to walk their streets and be secure in their homes—in fact, to do what they want when they want—depends to a great extent on their policemen.

We ask this Court to do no more than it has already done in reaffirming those principles of finality in the civil litigation process that will make it possible for the police to continue their difficult tasks, while fully protecting individuals who have meritorious claims of violation of their civil rights. The balance has already been struck by this Court many times, as, for example, in *Allen* v. *McCurry*, 449 U. S. 90 (1980), in which *amicus* AELE filed a brief with this Court on behalf of the petitioners in that case. In *Allen* this Court held that conventional doctrines of collateral estoppel are to be applied to § 1983 claims. We ask the Court not to recede from the appropriate application of the principles of law inherent in *Allen*.

ARGUMENT

AFFIRMANCE OF THE DECISION OF THE COURT OF APPEALS WILL ENCOURAGE INNUMERABLE STATE PRISONERS TO SEEK LITIGATION OF FOURTH AMENDMENT AND OTHER CONSTITUTIONAL CLAIMS UNDER 42 U. S. C. § 1983 AND WILL SUBJECT INCREASING NUMBERS OF LAW ENFORCEMENT OFFICERS TO THE HARASSMENT AND VEXATION OF GROUNDLESS CIVIL LITIGATION

This case raises the issue of whether a person who has pled guilty in a state criminal court to manufacturing illegal drugs, and who did not raise the validity of the search that produced the essential evidence of the crime, can subsequently bring an action in a federal court under 42 U. S. C. § 1983 claiming that the search was unconstitutional. It is the contention of the petitioners that by pleading guilty in the state criminal court, respondent waived his right to litigate the constitutionality of the search in a § 1983 action, and that the conviction based upon such plea collaterally estops the respondent from proceeding in a § 1983 action, inasmuch as the state court expressly found a sufficient factual basis for the plea and that basis was the evidence produced by the search. Thus, the Fourth Amendment issues were impliedly determined against the respondent because the search was an essential ingredient in the proof of the crime.

Amici will not reiterate the legal arguments made by the petitioners in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, address a key policy issue in this case, and point out its importance to the effectiveness of law enforcement nationwide.

We refer to the likelihood of a continued "torrent" of groundless civil litigation if the decision of the court below is affirmed. That term was applied to the dramatic growth of civil

rights litigation in recent years by Mr. Justice Rehnquist in his dissent in *Monell* v. *Dept. of Social Services,* 436 U. S. 658, 724 (1978). The potential for this explosion of civil rights litigation is greater in the instant case than it was in *Allen* v. *McCurry, supra,* in view of the far greater number of convictions in the state courts based upon pleas of guilty rather than as the result of trials.

The statistics of filings of civil rights actions in the Federal District Courts substantiate the validity of Justice Rehnquist's warning. Such filings during the period 1961 to 1973 grew from 261 to 7,679. *Administrative Office of the United States Courts, 1973 Annual Report* 128. During the fiscal years 1974 through 1978, filings of all types of actions by state prisoners alone grew from 13,423 to 16,969. *Administrative Office of the United States Courts, 1978 Annual Report* 60. During fiscal 1977 and 1978, while all categories of prisoner filings increased 12.2%, civil rights suits filed by prisoners increased 25.9% to 10,366. *Id.,* 61. Between 1970 and 1978, civil rights complaints filed by state prisoners increased 379.3%, totaling some 9,730 in 1978. *Id.,* 75-76. All prisoner filings increased 907.1% between 1960 and 1978, while general civil filings grew a mere 134.1% by comparison, *Id.,* 77.

The latest statistics gathered by the Administrative Office of the United States Courts will show a relentless increase from the 1978 levels, as indicated in this abridged Table which is to appear shortly in the *1982 Annual Report:*

Table 20
U.S. District Courts
Prisoner Petitions Filed
During the Twelve Month Periods Ended June 30, 1970 and 1975 through 1982

Type of Petition	1970	1975	1976	1977	1978	1979	1980	1981	1982	Percent Change 1982 over 1977	Percent Change 1982 over 1981
Petitions by State Prisoners.....	11,812	14,260	15,029	14,846	16,969	18,502	19,574	23,607	24,975	68.2	5.8
Civil Rights	2,657	6,128	6,958	7,752	9,730	11,195	12,397	15,639	16,741	115.6	7.0

Administrative Office of the United States Courts, 1982 Annual Report _____. Prepared by: Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, Washington, D.C. 20544.

How great is the potential exposure to civil rights litigation by state prisoners as a result of the decision of the court below can be seen by the following abridged table of criminal disposition types for state courts for the year 1977, which will shortly be published by the National Center for State Courts. This table shows the far greater number of state convictions based upon guilty pleas than after trial, as was involved in *Allen* v. *McCurry, supra.* The figures for the largest state, California, are illustrated here:

Table 38

Criminal disposition types for trial courts, 1977.

State population. Courts reporting criminal disposition types, grouped by unit of count definition.

Plea, total conviction, trial conviction, acquittal, nolle prosequi, and dismissal.

Each disposition type as a percent of criminal dispositions.

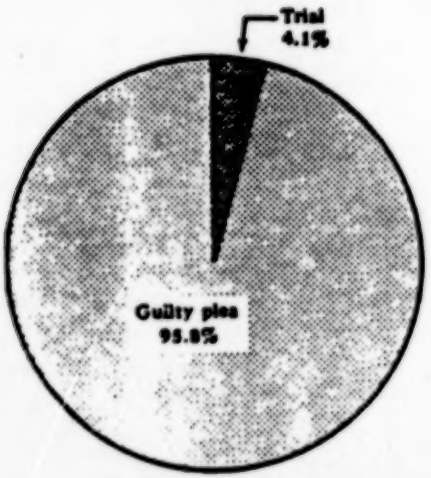
State, court title, and unit of count	Adult population in thousands	Total criminal dispositions	Plea		Total conviction		Trial conviction		Acquittal		Nolle prosequi		Dismissal	
			Number	As percent of disposed	Number	As percent of disposed	Number	As percent of disposed	Number	As percent of disposed	Number	As percent of disposed	Number	As percent of disposed
Number of defendants														
California STATE TOTAL	15,632	739,353	422,196	57	440,607	60	18,411	2	12,983	2			157,378	21
Superior Court	–	49,111	35,089	71	41,644	85	6,555	13	1,540	3			5,441	11
Justice Court	–	64,921	28,651	44	31,451	48	2,800	4	2,053	3			10,585	16
Municipal Court		625,321	358,456	57	367,512	59	9,056	1	9,390	2			141,352	23

State Court Caseload Statistics: Annual Report, 1977, National Center for State Courts _____ (1982). Footnotes indicating that some data from the courts are still incomplete are omitted from this abridged table.

As these statistics vividly indicate, out of 440,607 convictions, 422,196, or 96%, were based upon pleas of guilty. Convictions after trial accounted for only 18,411 cases, or 4% of the total. This Court's decision in *Allen* v. *McCurry, supra,* prevents post-conviction civil rights litigation in only 4 out of 100 cases. But, what of the other 96%?

The statistics for Calfornia in 1981 show no dilution of this potential for a torrent of post-conviction civil rights litigation. Of 116,622 adult felony arrestees convicted in California courts in 1981, 111,783, or 95.8% resulted from guilty pleas, while only 4,839, or 4.1%, resulted from trial verdicts. This illustration makes the point quite vividly:

METHOD OF CONVICTION OF ADULT FELONY ARRESTEES CONVICTED IN 1981



Note: Percents may not add to 100.0 because of rounding.
Source: Table 46.

Department of Justice, State of California, Crime and Delinquency in California, 1981, 48, 49 (1982).

Amici submit that the decision of the Fourth Circuit Court of Appeals can only encourage this increase in federal civil rights litigation by state prisoners, while producing the anamolous result that insufficient attention may be paid to meritorious claims by judges reacting to the suffocating numbers of frivolous claims. Respondent may be pleased to find himself in the federal courts with his claim, but many prisoners who are less fortunate to gain the ear of a federal court judge with a meritorious claim will not applaud his effort. Additionally, it cannot be doubted that while the incidence of litigation against law enforcement officers will continue to skyrocket, fueled by decisions such as that of the Court of Appeals, legitimate and necessary law enforcement activities will be adversely affected by the flood of frivolous litigation.

We do not criticize the right of a citizen to sue law enforcement officers for legitimate injuries. However, although some meritorious claims are settled, surveys of state and federal police misconduct litigation conducted by **AELE** indicate that less than *four per cent* of all suits filed ever result in a plaintiff's verdict. The vast majority of cases are groundless and are dismissed by the courts for lack of a viable cause of action or are voluntarily dropped by plaintiffs. Of those that *actually go to trial,* plaintiffs recover in only 25.77% of the cases. Many of the unsuccessful cases are filed to harass conscientious police officers, to obtain revenge, or to provoke discussions leading to the dismissal or reduction of criminal charges pending against a plaintiff.

Amici concede that civil litigation provides an incentive for police administrators to continually evaluate departmental procedures and monitor practices of specific officers. The overwhelming volume of suits, however, whether based upon Fourth Amendment claims or other alleged violations of constitutional rights, is counterproductive to this end. Frivolous claims in large numbers numb or desensitize a responsible law enforcement executive. Truly legitimate complaints are overshadowed by thousands of frivolous claims.

The following Table, based upon an **AELE** survey of two five year periods, indicates the status of such suits:

STATUS	PERCENT OF SUITS BY STATUS* 1967-71	1972-76
Suits still pending	32.1	41.2
Suits settled	14.4	22.5
Dropped by plaintiffs or dismissed on a motion	29.4	22.6
Number tried in court which police WON	19.6	10.1
Number tried in court which police LOST	4.5	3.5

These statistics dramatically illustrate the need for this Court to avoid further exacerbation of the litigation explosion involving law enforcement officers that has overtaken our state and federal courts. *Amici* respectfully submit that the application of collateral estoppel principles to § 1983 actions in guilty plea cases emanating from the state courts will assure that meritorious Fourth Amendment claims receive the prompt, effective attention from state and federal courts that they deserve, while at the same time protecting law enforcement officers from the harassment and vexation of groundless civil litigation.

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* The two five year surveys included a cross-section of 2,060 law enforcement agencies that, in 1977, employed 153,130 officers, or about 25% of the nation's total.

CONCLUSION

Amici respectfully submit that the decision of the United States Court of Appeals, Fourth Circuit, should be reversed on the law and on the basis of sound judicial policy.

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On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW POST-CONVICTION ASSISTANCE PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GILBERT A. HARING, Lieutenant,
Arlington County Police Department, *et. al.*,
Petitioners,

vs.

JOHN FRANKLIN PROSISE,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW POST-CONVICTION ASSISTANCE PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed pursuant to Rule 36.2 of this Court. Consent to file has been granted by David R. Lasso, Esq., City Attorney for the City of Falls Church, Virginia, Counsel for Petitioners, and by Norman A. Townsend, Esq., Counsel for Respondent. Letters of consent of both parties accompany this filing.

INTEREST OF THE *AMICUS CURIAE*

The Post-Conviction Assistance Project (P-CAP) is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of Law. Since its establishment in 1971, P-CAP has advocated respect for the often ignored rights of incarcerated Virginians. Despite waning student concern for public interest law and budgetary constraints that severly limit such efforts, P-CAP members represent inmates in disciplinary hearings at four Virginia prisons, answer inquiries and requests for legal assistance from *pro se* litigants, and provide research assistance and direct representation in federal habeas corpus and 42 U.S.C. § 1983 suits, pursuant to third-year practice rules of the Court of Appeals for the Fourth Circuit. Faculty members of the School of Law and Virginia attorneys in private practice provide supervision.

P-CAP receives its funding from University of Virginia student activities funds, the University of Virginia Law School Foundation, and private donations. It has no financial interest in the outcome of this case.

P-CAP's interest as *amicus curiae* arises from its experience working with *pro se* litigants in federal courts. This experience has made P-CAP members aware of the need for clear rules governing access to federal courts in habeas corpus and § 1983 cases. *Pro se* litigants face formidable procedural barriers to the assertion of meritorious claims, too often merely because the rules governing access to a federal forum are undefined or cannot be generally understood. As the law regulating such access becomes increasingly complex, it is the artful jailhouse lawyer or the inmate lucky enough to receive professional assistance whose petitions receive the attention of federal courts. The claims of genuinely aggrieved *pro se* litigants are frequently ignored and dismissed on procedural grounds. The concern of *amicus curiae* is that the law regulating access to a federal forum under § 1983 should not be structured to frustrate litigation of meritorious constitutional claims.

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SUMMARY OF THE ARGUMENT

The Judicial Code, 28 U.S.C. § 1738 (1976), requires that federal courts give full faith and credit to the judgments of state courts. Under the command of § 1738, state judgments are to be given the same preclusive or nonpreclusive effect by federal courts as they would be by courts of the judgment-rendering state. A federal court may give a state judgment no greater effect than it has under the res judicata rules chosen by the state rendering judgment. *Union & Planters' Bank v. Memphis*, 189 U.S. 71 (1903). This principle is reaffirmed in the language of *Kremer v. Chemical Construction Corp.*, 102 S. Ct. 1883 (1982).

Virginia would not give preclusive effect to its judgment of conviction on a plea of guilty as to fourth amendment issues not actually and necessarily determined therein. Antecedent constitutional claims are neither actually nor necessarily determined when a conviction is based on a guilty plea, partly because the plea of guilty is itself sufficient to support the conviction, notwithstanding any evidentiary hearing on the plea. Respondent's § 1983 suit does not present the same cause of action as his criminal trial, nor is the legality of the search and seizure an issue actually and necessarily determined by the prior criminal proceeding.

The general principles of res judicata and collateral estoppel are consistent with the court of appeals' decision to allow the respondent to maintain a civil action notwithstanding his guilty plea. That court correctly interpreted and distinguished its own prior decisions, as well as this Court's holdings in *Allen v. McCurry*, 449 U.S. 90 (1980) and *Montana v. United States*, 440 U.S. 147 (1979).

ARGUMENT

I. 28 U.S.C. § 1738 REQUIRES THAT A VIRGINIA JUDGMENT OF CONVICTION BE GIVEN NO GREATER EFFECT IN THE FEDERAL COURTS THAN IT WOULD BE GIVEN BY VIRGINIA COURTS.

The Judicial Code, 28 U.S.C. § 1738 (1976), extends the application of the full faith and credit clause, U.S. Const. art. IV, § 1, to the federal courts, requiring that they give the same effect to a state court judgment as would be given by the courts of the state rendering the judgment. *Kremer v. Chemical Construction Corp.*, 102 S. Ct. 1883 (1982) (title VII action). The effect of a state court judgment under § 1738 includes its preclusive effect under state law. As this Court said in *Kremer:*

> It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and *commands* a federal court to accept the rules *chosen by the state from which the judgment is taken.*

Id. at 1897 (emphasis added).

Although *Kremer* held that a federal court must give as much preclusive effect to a state court's judgment as that state's court would, 28 U.S.C. § 1738 also requires that a federal court respect a state rule permitting relitigation following judgment. This Court's language in *Kremer* is quite clear: If a state has rules regarding the effect of state court judgments in subsequent

suits, then § 1738 "commands" the federal court to apply these rules. 102 S. Ct. at 1897.

Long ago, this Court considered the effect to be given state rules regarding the nonpreclusive effect of state judgments. In *Union & Planters' Bank v. Memphis*, 189 U.S. 71 (1903), a bank had won a judgment in the Supreme Court of Tennessee that declared ad valorem tax assessments by the city of Memphis invalid as a violation of the bank's charter and the contracts clause, U.S. Const. art. I, § 10. This Court, in a separate case, later decided that the bank's charter provided no such exemption.[1] When the city then sought to assess ad valorem taxes for a later year, the bank sought suit in federal circuit court challenging the assessment, pleading the prior Tennessee Supreme Court judgment as res judicata. On appeal from the circuit court, this Court held that state law governed the preclusive effect to be given the prior state judgment by the federal courts, and further explicitly held that the state judgment could be given no greater effect in the federal courts than it would be given in Tennessee courts:

> [The] effect of a judgment of a state court should have as *res judicata* is a question of state or local law....
>
> As the judgment pleaded had no force or effect in the Tennessee state courts other than as a bar to the identical taxes litigated in the suit, the Courts of the United States can afford it no greater efficacy.

189 U.S. at 75 (citations omitted).

Covington v. First National Bank, 198 U.S. 100 (1905), involved a similar prior judgment in a Kentucky circuit court, affirmed by the state's court of appeals. Because the settled

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[1] County of Shelby v. Union & Planters' Bank, 161 U.S. 149 (1896).

rule in Kentucky was that an adjudication in a suit for taxes would not estop an action to collect taxes for any other year, this Court followed *Union & Planters'* and held that the prior state judgment should be given no effect in federal court:

> We are now dealing with the weight to be attached to a state judgment when pleaded as *res judicata* in a Federal court. That was the very question decided by this court in the case of *Union & Planters' Bank v. Memphis*, . . . wherein it was held that the Federal courts were not required to give to such judgments any greater force or effect than was awarded to them by the courts of the State where they were rendered.

198 U.S. at 109.
This Court so held notwithstanding that a different rule of estoppel then prevailed in federal courts. *Id.* at 108. Although language from the *Covington* opinion quoted above may appear to retreat somewhat from the position announced in *Union & Planters'*, the result of the case does not suggest that federal courts have authority under § 1738 to grant a state judgment *greater* preclusive effect than courts of the judgment-rendering state would itself grant.

Kremer reinforces the argument that state law governs the scope of the preclusive effect of a state judgment. The Court of Appeals for the Fifth Circuit recognized this recently in *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982). The plaintiff brought an action in federal district court under 42 U.S.C. § 1983 seeking damages for an allegedly unconstitutional attachment of 200 acres of his realty. The district court granted defendants' motion for summary judgment, holding that a prior Louisiana judgment on the attachment was res judicata as to the plaintiff's constitutional claims. The court of appeals reversed on this point, holding that under § 1738 the scope of the state judgment was necessarily a matter of state law. The court's opinion expressly relied on *Kremer* as prohibiting federal courts from giving state judgments greater preclusive effect than the judgment-rendering judisdiction:

> *Kremer* apparently dooms the assumption of many courts and commentators that federal courts may be free to grant *greater* preclusive effect to state court judgments than would the courts of the judgment-rendering state. Thus, we are not free to apply federal preclusion principles and must determine the preclusive effect of the Louisiana judgment by resort to the Louisiana law of res judicata.

681 F.2d at 1035-36 (footnote omitted) (emphasis in original). In the omitted footnote, the Fifth Circuit regarded the issue as having been resolved by *Union & Planters' Bank*. 681 F.2d at 1035 n.5. *Accord, e.g., Neale v. Goldberg*, 525 F.2d 332 (9th Cir. 1979) (federal courts bound by California law of res judicata as to preclusive effect of California judgment); *McCune v. Frank*, 521 F.2d 1152, 1156 (2d. Cir. 1975) (citing *Union & Planters'* to remand for determination of identity-of-parties issue in accordance with New York law of res judicata); *Bell v. City of Milwaukee*, 514 F. Supp. 1363 (E.D. Wis. 1981) (federal courts must apply state concepts of collateral estoppel and res judicata); *Holden v. Cities Service Co.*, 514 F. Supp. 662 (E.D. Tenn. 1980) (federal court may grant no greater preclusive effect than state would); *Menzel v. County Utilities Corp.*, 501 F. Supp. 354 (E.D. Va. 1979) (federal court must give same effect to state court decision as would be given by another court of the state). *Cf. Lefkowitz v. Newsome*, 420 U.S. 283 (1975) (habeas case).[2]

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[2] In *Lefkowitz*, this Court held that a guilty plea in a state criminal trial did not foreclose federal habeas review of antecedent constitutional defects, where the state permitted an accused to plead guilty but preserve specified constitutional claims. Stone v. Powell, 428 U.S. 465 (1976), of course, partly limited *Lefkowitz* and other cases by foreclosing federal habeas corpus review of most fourth amendment claims arising out of state criminal prosecutions. However, *Lefkowitz* continues to reinforce the principle that federal courts must look to state law to determine the scope of a state judgment. New Jersey v. Portash, 440 U.S. 450, 455 n.4 (1979).

The policies underlying § 1738, identified in *Kremer*, also support the Fifth Circuit's interpretation of that case. Section 1738 embodies important concepts of comity and federalism. A decision to accord Virginia judgments greater effect in federal courts than they receive in the courts of the Commonwealth would undermine the integrity of the Virginia judicial system, encourage forum shopping, and derogate from the protection against unfair surprise that Virginia accords its citizens through the state's application of res judicata and estoppel. Just as Virginia has an interest in having its judgments enforced regardless of the forum, it has an equal interest in the enforcement of its restrictions on the effect of those judgments. Thus, we ask this Court to respect the stated policies of the Commonwealth of Virginia regarding the effect to be given the judgments of its courts.

II. VIRGINIA WOULD NOT GIVE PRECLUSIVE EFFECT TO A CRIMINAL JUDGMENT IN A SUBSEQUENT CIVIL ACTION AS TO ANY ISSUE NOT ACTUALLY AND NECESSARILY DETERMINED IN THE CRIMINAL PROCEEDING.

Virginia precludes a party from relitigating an issue in two situations: (1) A party is precluded from litigating an issue that he had a full and fair opportunity to litigate in a prior proceeding *based on the same cause of action*, and (2) A party is precluded from relitigating any issue *actually and necessarily determined* in a prior proceeding *based on a different cause of action*. Virginia courts have labeled the first preclusive doctrine res judicata and the second, collateral estoppel. *Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974). The use of these terms by Virginia courts differs somewhat from the usage of other jurisdictions. Distinguishing between the two preclusive doctrines is essential in the present case.

In *Eason v. Eason*, 204 Va. 347, 131 S.E.2d 280 (1963), the Virginia Supreme Court clearly articulated the distinction between the two doctrines. The complainants had originally sued to contest the will of their still-living aunt, claiming that she was incompetent. While the appeal of that action was

pending, the complainants sued for specific performance of certain agreements by the aunt to devise land to them. In the first proceeding, the complainants had introduced releases signed by them that relieved the aunt of any duty to devise the land to the complainants. After the complainants lost their suit contesting the will, the aunt moved to preclude them from litigating the validity of the agreements to devise in the subsequent action. The aunt based her motion on the complainants' introduction of the releases in the prior suit. The Virginia Supreme Court found that the two suits were based on different causes of action, and accordingly held:

> "'[W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry *must always be* as to the point or question actually litigated and determined in the original action; *not what might have been thus litigated and determined.* Only upon such matters is the judgment conclusive in another action.'"

204 Va. at 350, 131 S.E.2d at 282 (emphasis added) (quoting *Kemp v. Miller*, 166 Va. 661, 674-75, 186 S.E. 99, 104 (1936) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876)). Because the determination of the validity of the agreements to devise was not necessary to the finding that the aunt was competent, litigation of the issue was not precluded by the judgment in the prior suit.

Similarly, in *Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974), the Virginia Supreme Court held that the dispositive issue in determining whether the application of res judicata or collateral estoppel was proper in a given case is whether the two

suits constitute the same cause of action. The court explained the two preclusive doctrines, stating:

> *Res judicata-bar*, is the particular preclusive effect commonly meant by use of the term "res judicata." A valid, personal judgment on the merits in favor of the defendant bars relitigation of *the same cause of action*, or any part thereof which could have been litigated between the same parties and their privies. . . . .
>
> *Collateral estoppel* is the preclusive effect impacting in a subsequent action based upon a collateral and *different cause of action*. In a subsequent action, the parties to the first action and their privies are precluded from litigating any *issue* of fact actually litigated and essential to a valid and final personal judgment in the first action.

Id. at 670-71, 202 S.E.2d at 920-21 (citing Restatement of Judgments §§ 47, 62, 68, 82, 83 (1942)) (footnotes omitted) (emphasis in original). *See also Cohen v. Power*, 183 Va. 258, 32 S.E.2d 64 (1944) (fact that issue could have been raised in prior proceeding does not justify preclusion as to that issue in subsequent suit based upon different cause of action).

The *Bates* opinion has been cited in recent Virginia cases and commentaries as explaining Virginia's treatment of res judicata and collateral estoppel. *See, e.g., Norfolk & Western Railway Co. v. Bailey Lumber Co.*, 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980); T. Boyd, E. Graves & L. Middleditch, *Virginia Civil Procedure* § 12.11, at 463 n.78, 465 n.81 (1982) [hereinafter cited as *Virginia Civil Procedure*].[3]

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[3] The American Law Institute's current treatment of this issue is identical to the approach taken in *Bates*. *See* Restatement (Second) of Judgments § 27 comment e (1982). The Restatement (Second) authors rejected "opportunity" to litigate as a justification for the application of estoppel in a subsequent suit based on a different cause of action. *Id. See also* Hazard, *Revisiting the Second* Restatement of Judgments: *Issue Preclusion and Related Problems*, 66 Cornell L.Q. 564 (1981).

The Virginia Supreme Court recently reaffirmed its distinctive use of res judicata and collateral estoppel in *Greene v. Warrenton Production Credit Association,* 223 Va. 462, 291 S.E. 2d 209 (1982). The two litigants had been codefendants in a prior attachment proceeding brought by a bank. Greene later brought an action against Warrenton for breach of its fiduciary duty. Warrenton pleaded res judicata and estoppel. The Virginia Supreme Court refused to invoke res judicata. The court then expressly followed *Bates v. Devers* to hold that, because the two suits involved different causes of action and the breach issue had not been actually and necessarily litigated in the prior suit, Greene could not be collaterally estopped from litigating the issue of breach of fiduciary duty. *Id.* at 466-67, 291 S.E.2d at 212.

Prosise's § 1983 suit clearly does not constitute the same cause of action as the state's criminal prosecution for the manufacture of illegal drugs. Nor can it be said that the constitutionality of the search of Prosise's apartment was actually and necessarily litigated by his conviction on a plea of guilty to the criminal charge. Neither res judicata nor collateral estoppel would be invoked by the Virginia courts to preclude Prosise's § 1983 action.

A. Res Judicata

Virginia courts invoke the doctrine of res judicata in a subsequent suit only when that suit is based on the same cause of action as the prior suit. What constitutes the "same cause of action" was explained by the Virginia Supreme Court in *Cohen v. Power:*

> If the same facts or evidence would sustain both actions, then the two actions are considered the same and a judgment in one bars any subsequent cause of action based upon the same facts. If different proof is required to sustain the different actions, a judgment in one is no bar to the maintenance of the others. . . .

183 Va. at 261, 32 S.E.2d at 65 (citation omitted).

Prosise need not prove his innocence in order to establish that the search of his apartment violated the fourth amendment; nor does the state have to demonstrate the legality of the officers' search in order to sustain the conviction. Other evidence than that seized was available to and subsequently used by the state. Thus the "same facts or evidence" are not necessary to sustain both actions.

B. Collateral Estoppel

Collateral estoppel would not be invoked by Virginia courts in the present case because the constitutionality of the search of Prosise's apartment was never litigated in the criminal trial, and because proof that a fourth amendment violation did not occur was not essential to the trial court's finding that Prosise was guilty of the manufacture of illegal drugs.

Virginia invokes the doctrine of collateral estoppel only when the issue sought to be precluded has been actually and necessarily litigated in a prior proceeding. *Aetna Casualty & Surety Co. v. Anderson*, 200 Va. 385, 105 S.E.2d 869 (1958). This rule was recently reaffirmed in *Luke Construction Co. v. Simpkins*, 223 Va. 387, 291 S.E.2d 264 (1982) and *Norfolk & Western Railway Co. v. Bailey Lumber Co.*, 221 Va. 638, 272 S.E.2d 217 (1980).[4] The burden of proof to demonstrate that the

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[4] *Cf.* Ridley v. Leavitt, 631 F.2d 358 (4th Cir. 1980) (per curiam), which reached a similar result without expressly relying on Virginia's estoppel doctrines. In *Ridley*, the plaintiff brought a § 1983 action against six deputy sheriffs for severe beatings he allegedly received while in pretrial detention in a Norfolk city jail. Defendants attempted to invoke plaintiff's prior state criminal conviction for assault on three of the deputies, arising out of the same incident, to estop the plaintiff from litigating his claim of use of excessive force by defendants. The court of appeals refused to invoke collateral estoppel, stating that the issue of excessive use of force had not been determined by the prior conviction on the assault charges, even though the § 1983 litigant had adequate opportunity to raise the issue in the prior criminal proceeding. This view of collateral estoppel comports with the Virginia rule.

issue has been actually and necessarily litigated in the prior proceeding rests with the party attempting to invoke collateral estoppel. *Lee v. Commonwealth*, 219 Va. 1108, 254 S.E.2d 126 (1979).

A glance at the transcript of Prosise's state proceedings compels the conclusion that the question of whether Prosise's fourth amendment rights were violated by petitioners' search of his apartment was never litigated. This fact alone prevents the application of collateral estoppel under Virginia law.

The other prerequisite for the application of collateral estoppel is also lacking here. A finding by the criminal trial court as to the legality of the search and seizure, even had such a finding been made, would not have been essential to the judgment of conviction.

In *Petrus v. Robbins*, 196 Va. 322, 83 S.E.2d 408 (1954), the plaintiff had been the defendant in a prior suit for damages arising from an automobile accident. In that first suit, the defendant counterclaimed for damages to her car. The court found that both parties had been negligent and denied both recovery. The original defendant subsequently brought suit against the original plaintiff for personal injuries arising from the accident. After concluding that the second suit was a different cause of action, the Virginia Supreme Court held that the plaintiff was precluded from relitigating the issue of her negligence since it had been actually litigated in the first suit and the finding of negligence was necessary to dispose of her counterclaim in that action. The court stated:

> [T]o render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined — that is, that the verdict *could not have been rendered without deciding that matter* . . . .

Id. at 330, 83 S.E.2d at 412 (emphasis added) (citing *Russell v. Place*, 94 U.S. 606, 608 (1876)).

Similarly, in *Eason v. Eason*, the court stated:

> In order, therefore, for the decree in the will case to be conclusive of the issues in the present suit, it must appear by the record of the prior litigation that the question of the effect of the releases was "actually litigated and determined," that is, that the verdict in favor of the validity of the will *could not have been rendered* without deciding such effect.

204 Va. at 350, 131 S.E.2d at 282 (emphasis added).

In *Lee v. Commonwealth*, 219 Va. 1108, 254 S.E.2d 126 (1979), the defendant was allowed to invoke collateral estoppel in a state prosecution for hit and run and manslaughter after misdemeanor charges of driving with a revoked license had been dropped for lack of evidence that he had been driving the car. Although *Lee* turned on jeopardy issues, the court enunciated Virginia's standard for the application of collateral estoppel, stating: "The doctrine of collateral estoppel does not apply if it appears that the prior judgment could have been grounded 'upon an issue other than that which the defendant seeks to foreclose for consideration.' " *Id.* at 1111, 254 S.E.2d at 127 (citing *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). In *Lee*, there was an express finding that the prior judgment could not have been so grounded.

Thus, the question is: Was a finding that Prosise was not subjected to an unconstitutional search essential to Virginia's judgment of conviction on the plea of guilty? The answer is clearly negative. In a Virginia criminal case, a guilty plea alone is sufficient evidence to sustain a conviction. As stated in *Welborn v. Cox*, 337 F. Supp. 16 (W.D. Va. 1971):

> [A] conviction obtained upon such a plea is based solely on the plea and not upon any evidence which may have been acquired by the prosecuting authorities.

Id. at 17 (citing *Camm v. Peyton*, 229 F. Supp. 485 (W.D. Va. 1969) (other citation omitted). *See also Knight v. Johnson*, 529 F. Supp. 1309 (E.D. Va. 1982).

The fact that an evidentiary hearing took place after Prosise's entry of a guilty plea does not warrant a conclusion that the evidence introduced in that proceeding was essential to the finding of guilt. In *Kibert v. Commonwealth*, 216 Va. 660, 222 S.E.2d 790 (1976), the Virginia Supreme Court held that the introduction of evidence to sustain a conviction based on a guilty plea was unnecessary in any criminal case. The decision to hear such evidence rests entirely within the trial judge's discretion. *Knight v. Johnson*, 529 F. Supp. at 1319 (citing *Kibert; Hobson v. Youell*, 177 Va. 906, 15 S.E.2d 76 (1941)). The purpose of hearing such evidence is to establish aggravating or mitigating factors pertinent to sentencing. *Knight*, 529 F. Supp. at 1321. Thus, the introduction of such evidence at Prosise's trial was not *essential* to a finding of guilt or to the judgment rendered on the plea of guilty. Because the evidence was not essential, a finding that the evidence was obtained constitutionally was also not essential to the judgment. Therefore, the issue of whether the evidence was obtained in violation of the fourth amendment cannot be precluded under the general doctrine of collateral estoppel as applied by the Virginia courts.

Eagle, Star & British Dominions Insurance Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927), treated in the opinion below as a single exception to a general Virginia rule against granting preclusive effect to criminal judgments in subsequent civil actions,[5] in fact illustrates the application of Virginia's requirement that the matter sought to be precluded must have been actually and necessarily litigated in the prior proceeding. Heller had been found guilty of arson but later brought suit to recover fire insurance benefits on the very house he had burned

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[5] Prosise v. Haring, 667 F.2d 1133, 1139 (4th Cir. 1981), *cert. granted*, 103 S. Ct. 205 (1982). The issue in *Heller* that has received the most attention is the Virginia Supreme Court's deviation from a former strict mutuality requirement when a party sought to invoke collateral estoppel defensively. That court has since held that *Heller* qualified the mutuality requirement in Virginia, but does not eliminate it. *See Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974); *Virginia Civil Procedure, supra* p.10, § 12.11, at 468-71.

down. Because the issue actually litigated and essential to Heller's conviction was also dispositive of the issue of liability under the policy in the second suit, the Virginia Supreme Court held him estopped from litigating the claim against the insurer. Therefore, the requirement of "actual and necessary" adjudication had been met.

The only case that might be thought to be inconsistent with the clearly established Virginia law set forth herein is *Cramer v. Crutchfield,* 648 F.2d 943 (4th Cir. 1981) (per curiam). But *Cramer,* on careful consideration, actually is in accord with Virginia estoppel doctrine. Cramer was convicted in a contested trial when evidence he later claimed was illegally seized was used against him. After the conviction, he brought a § 1983 action, alleging an unconstitutional search and seizure, malicious prosecution, and abuse of process. In support of the last two claims, Cramer urged that the evidence could not have properly been used against him. The court found that the limitations period applicable to the search and seizure claim had expired, and held that the remaining claims could not be maintained against officers who had produced admissible evidence against Cramer in state court. In other words, the remedy for *introduction* of illegally seized evidence is an objection at trial, not a subsequent action under § 1983. Had the Virginia statute of limitations for personal injury actions not expired in *Cramer,* the plaintiff would have been free to maintain his action for the alleged unlawful *search and seizure.*[6]

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[6] In the opinion below, the court of appeals distinguished its earlier holding in *Cramer* in a different fashion. The court noted that the state judgment of conviction given preclusive effect in *Cramer* was based on an adjudication of guilt in a contested trial, not on a plea of guilty. *Prosise,* 677 F.2d at 1138. The court observed that Prosise's guilty plea obscured a fact made clear in *Cramer:* The evidence used to convict in the state criminal prosecution was the same evidence obtained in the search which formed the basis for the later § 1983 action, and the plaintiff therefore had adequate incentive to seek suppression of the evidence in the state criminal trial. *Id.* at 1142 n.15. As the court noted, in a guilty plea case, the presence of an attractive plea bargain, the availability of other evidence to support the prosecution, and related factors may clearly indicate that the party later sought to be estopped lacked adequate incentive to litigate "to the hilt" issues relating to the

The opinion of the court of appeals in the present case overstates the matter when it suggests that Virginia accords no preclusive effect to criminal judgments in subsequent civil litigation, *Prosise*, 667 F.2d at 1139, and when it adopts a general rule of nonpreclusion in criminal guilty plea cases. *Id.* at 1142. Instead, Virginia requires that any matter sought to be precluded have been actually and necessarily litigated in the criminal trial. The absence of any case, except *Heller*, in which preclusive effect has been accorded to issues arising out of a criminal judgment, demonstrates that Virginia's test is a rigorous one, and that it is stringently applied.

III. PRECLUDING A DEFENDANT IN A STATE CRIMINAL PROCEEDING FROM PLEADING GUILTY AND SUBSEQUENTLY PURSUING A CIVIL ACTION FOR VIOLATION OF HIS CONSTITUTIONAL RIGHTS WOULD NOT FURTHER THE POLICIES UNDERLYING PRECLUSION OF CLAIMS OR ANY FEDERAL INTEREST, WHILE IT WOULD FRUSTRATE IMPORTANT STATE INTERESTS AND UNDULY BURDEN STATE COURTS.

Preclusion of claims generally occurs when claims have been fully litigated in a prior proceeding. *See Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. United States*, 440 U.S. 147 (1979); *Rimmer v. Fayetteville Police Department*, 567 F.2d 273 (4th Cir. 1977). Several policies support preclusion. It conserves scarce judicial resource by permitting courts to decide a claim on a single

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admissibility of evidence seized in a search claimed to violate the fourth amendment. *Id.* at 1141.

This Court has expressed its approval of plea bargaining as an element of a state's judicial system. *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978). To require that one vindicate his constitutional right to privacy by making an evidentiary motion in a state criminal trial would create serious determents to the efficient operation of the plea bargaining procedure.

occasion. It also serves notions of comity; a second court will respect what another court has first determined. Finally, it protects against harassment of and inconvenience to litigants by assuring that, once a claim has been fairly heard and resolved, it will not be heard again.

With these policies in mind, it is understandable that a defendant in a criminal case who chose to litigate fully a fourth amendment claim and lost might be estopped from relitigating the claim in a subsequent civil action. *See Allen v. McCurry.* Similarly, were a defendant to win on a motion to suppress in state court, that victory might preclude a police officer in a subsequent civil action from contending that a search and seizure was valid (assuming that the officer was treated under state law as a party in privity with the state in the criminal case). *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979). The instant case differs from both of these situations, however, in that Prosise's fourth amendment claim was never heard in state court.

Because the claim was not previously raised in state court, there is no repetitive use of judicial resources, no comity concern, and no threat of harassment of or inconvenience to litigants in the federal action. Thus, none of the policies supporting the general notion of preclusion applies in the context of this case. But substantial state interests would be impaired by a holding that a defendant who pleads guilty without raising a fourth amendment claim on a motion to suppress loses the right to bring a subsequent civil rights suit. These state interests are preserved under § 1983, for "[t]o the extent that it did intend [through enactment of § 1983] to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion." *Allen,* 449 U.S. at 100.

First, a state understandably may wish to impose swift punishment on those who violate its laws. The very idea of a guilty plea implements this interest. The person who pleads guilty accepts punishment without delay and thus triggers the rehabilitative and deterrent forces of the criminal justice system. Requiring a defendant whose constitutional rights have been

violated to raise such claims in a motion to suppress and to litigate fully those claims would significantly impede state processes in cases in which both the prosecution and defense are willing to move forward without delay. There is no federal interest in retarding state proceedings, yet there is a threat to important state interests.

Second, to require a state criminal defendant to raise a fourth amendment claim in state court as a precondition to a subsequent civil rights action would frequently compel litigation of issues involving evidence having little bearing on the criminal case. In other words, even where a prosecutor has overwhelming evidence aside from that seized illegally, a defendant, knowing full well that a motion to suppress could not affect the outcome of his case, would have to make the motion and waste the time of the state trial court and prosecutor simply to preserve a point for subsequent litigation. Motions to suppress on points almost irrelevant to state criminal proceedings could cause prosecutors and judges to treat defendants who made them more harshly than they otherwise might. Yet a defendant who wished to avail himself of his civil remedy would have no choice but to make such motions, and defense counsel's professional and ethical obligations would undoubtedly require him to litigate such issues in order to serve the client and preserve his rights. Failure to do so, even if sensible in the context of a criminal trial, could subject counsel to malpractice claims for failure to protect his client's civil rights. Moreover, were the trial court's suppression rulings deemed harmless by an appellate court, it would decline to correct them, even if erroneous. The civil rights litigant would be effectively deprived of appellate review of incidental rulings defeating fundamental substantive rights.[7] And there are still other problems. In Virginia, it is not clear that one who pleads guilty can preserve antecedent constitutional claims for appeal. If a defendant is forced to move for suppression of evidence and loses his motion, he might be

---

[7] It is well worth noting in this context that Virginia criminal defendants have no right of automatic appeal to the Virginia Supreme Court, except in captial cases. There is no intermediate appellate court in Virginia.

compelled actually to go to trial for the sole purpose of preserving his right to bring a subsequent civil action. As a result, defendants who prefer to plead guilty, and prosecutors who prefer to accept such pleas, could find themselves going to trial when neither want to. Such unnecessary trials would serve no important federal interests, but would certainly sacrifice important state interests.

Third, were a state to permit a defendant to plead guilty and preserve the right to appeal an unsuccessful motion to suppress evidence, state appellate courts might be faced with cases that involve no real controversy between the prosecution and the defense — i.e., both might want to leave the guilty plea and the resulting judgment undisturbed and obtain a ruling on a search and seizure claim that neither wishes to litigate in a criminal setting. *Cf. Lefkowitz v. Newsome.* It cannot be determined whether a court would decline to rule in such cases. If it did decide to rule, the state appellate court might again find that any error with respect to the denial of the motion to suppress was "harmless" in light of either the parties' willingness to enter into a plea bargain or other evidence in the case, without actually deciding if there was error. The result would be a tremendous waste of judicial resources without a decision on the only legal question that concerned anyone. Our judicial system is ill-equipped to decide issues inapposite to the matter at hand. For this Court now to require that state trial and appellate courts do so would serve no important federal interests, but would threaten vital state interests.

Fourth, under the approach taken by this Court in *Lefkowitz*, pleas might be taken with the explicit understanding that the plea does not bar subsequent civil litigation. However, requiring such an explicit statement might result in prosecutors negotiating civil liability of police officers in the course of plea bargaining, trading criminal punishment for release of a civil claim. This Court should not encourage this type of bartering, which raises the most serious ethical problems. Federal interests would not be served, and state interests would be defeated.

Finally, this Court recognized in *Lefkowitz* that the finality of state criminal judgments is a matter properly determined by

reference to state law. 420 U.S. at 288-92. State authorities share concurrent jurisdiction over civil rights claims with federal courts. This Court should respect the long-standing and widely-shared belief among state court systems that claims not litigated should not be precluded. *Cf. Allen*, 449 U.S. at 99 ("Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict traditional doctrines of preclusion.")

This court has never ignored a state's policy that litigants need not raise certain claims in a particular forum. In fact, in *Allen* — the most important case involving preclusion and § 1983 — this court quoted the full faith and credit statute and emphasized that how state courts enforce their judgments should determine how federal courts enforce them. 449 U.S. at 99. The preclusive effect of a state judgment is a matter determined by reference to state law.

Amicus curiae does not argue that Congress could not amend § 1738 or override it in particular cases by subsequent legislation. Indeed, Congress might well require criminal defendants to have successfully raised a claim in state court before bringing a civil rights action. But before the courts ignore traditional principles of res judicata and collateral estoppel and the full faith and credit statute, there must be some indication that Congress wished to impose on state courts the burdens described in this brief. *Amicus curiae* finds nothing in any congressional enactment to justify a departure from the full faith and credit statute, which has not been substantively altered since its enactment in 1790. Any departure from the honored principles it embodies would be inconsistent with the approach taken in *Allen v. McCurry*. "Since repeals by implication are disfavored, *Radzanover v. Touche Ross & Co.*, 426 U.S. 148, 154, . . . [clear] support would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." *Allen*, 449 U.S. at 99. *See also Kremer*, 102 S. Ct. at 1892 (§ 1983 does not implicitly repeal the application of § 1738).

Where a state's law of preclusion permits a defendant who has plead guilty to bring a subsequent civil action, nothing in any

congressional enactment nor in any justice-based policy supports a federal decision to ignore state law and deny the defendant the opportunity to vindicate his constitutional rights in a civil action. Indeed, reason, federal law, and the general understanding of preclusion require that Virginia's protection of its citizens' rights be respected.

CONCLUSION

For the foregoing reasons, *amicus curiae* believes that this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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Supervising Attorney
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January 28, 1983

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No. 81-2169

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GILBERT A. HARING, et al., Petitioners;

v.

JOHN FRANKLIN PROSISE, Respondent.

MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AFTER ARGUMENT

COMES NOW the respondent, by counsel, and moves this Honorable Court for leave to file the attached Supplemental Brief pursuant to Rule 35.6 of the Rules of the Supreme Court. As grounds for this motion, respondent states:

1. In a footnote to the reply brief in support of their petition for a writ of certiorari, petitioners for the first time brought to respondent and the Court's attention the case of Souders v. Gabrielson, et al., Record No. 741124 (Va.Sup.Ct. April 16, 1975), in which the Virginia Supreme Court had denied a writ of error to a judgment of the Arlington County, Virginia, Circuit Court (Reply Brief To Opposition To Petition For Writ Of Certiorari at 6 n. 5).

2. In their brief on the merits, petitioners again called attention to the Souders case in a footnote (Petitioners' Brief at 20 n.10). However, having no reason to believe that the

Souders court did not hold as petitioners related that it had,[1/] and not believing the holding to be on point or controlling authority even if it were on point, respondent chose not to comment upon Souders in his brief on the merits.

3. In their reply brief on the merits, though, petitioners for the first time pointed to the denial of a writ of error in Souders as "precedent" (see, e.g., Reply Brief at 4,5,6), for the proposition that "Virginia law precludes a civil suit based on §1983 after it is demonstrated that the plaintiff had previously pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief at 7). Still not believing Souders to be on point or controlling, respondent spent the limited time before oral argument after receipt of the reply brief determining the precedential effect of a denial of writ of error in Virginia rather than to going to the Arlington County Circuit Court to examine the record in the Souders case.

4. However, in oral argument several members of the Court expressed an interest in the precise holding of the Souders court. As a result, at the first opportunity after oral argument, respondent reviewed the record in Souders and discovered that the court actually precluded that §1983 action for a reason very different from the reason offered by petitioners.

5. Specifically, as noted above, petitioners cited Souders as "precedent" for the argument that in Virginia a §1983 action is precluded once it is "demonstrated that the plaintiff had previously pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief at 7). On the contrary, though, as a cursory examination of the Appendix to the attached Supplemental Brief reveals, the Souders court

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1/ For example, respondent noted that counsel for the police defendants in Souders now is counsel for petitioners in this case (Appendix at 4a).

precluded litigating that §1983 suit only after taking evidence and argument on the question "whether all of the issues which are presented in the [§1983] pleadings were, indeed, decided in th[e] lower Courts" (Appendix at 5a)(emphasis added).

6. As a result, rather than supporting petitioners' position, Souders supports respondent's position that collateral estoppel extends only to issues which were actually decided in the former suit. Either intentionally or unintentionally, petitioners have misstated the holding in Souders in order to support a proposition for which it does not stand. This brief is offered to apprise the court of the actual holding of Souders in order to avoid a ruling relying upon the holding of that case as petitioners have incorrectly stated it to be.

For the purpose of clarity and a full and fair resolution of the issue before the Court, and in the interest of justice and due process of law, respondent respectfully urges the Court to grant him leave to file the attached Supplemental Brief For Respondent and to consider the matters discussed therein as they may influence final resolution of the issues before the Court.

Respectfully submitted,

JOHN FRANKLIN PROSISE
By Counsel

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No. 81-2169

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GILBERT A. HARING, et al., Petitioners;

v.

JOHN FRANKLIN PROSISE, Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT

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STATEMENT

For a discussion of the Questions Presented, Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved, Statement of Facts, and Argument on the merits of the case, respondent respectfully directs the Court to the Brief For Respondent. This Supplemental Brief For Respondent is filed pursuant to Rule 35.6 of the Rules of the Supreme Court to address arguments advanced and authorities relied upon by petitioners in the Reply Brief To The Brief For Respondent and in oral argument before the Court on April 20, 1983. Haring, et al. v. Prosise, 33 Cr.L.Rptr. 4032 (U.S., argued April 20, 1983)(No. 81-2169). Attached hereto as an Appendix are certified copies of the Docket Sheet, an eleven (11) page transcript and an Order in Souders v. Gabrielson, et al., At Law No. 15840 (Arlington County Circuit Court, July 18, 1974). As reflected on the Docket Sheet (Appendix at 1a-2a), other matters are contained in the record of that case which are not included with this brief inasmuch as they are voluminous and are not relevant to the precise nature of the holding in that case.

ARGUMENT

Virginia's general rule of preclusion is that:

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Aetna Casualty & Surety Co. v. Czonka, 200 Va. 385, 388, 105 S.E. 2d. 869, 872 (1958)(a person in privity with the civil defendant pleaded guilty to an offense having as an essential elcment a

dispositive issue in the civil suit). The Virginia Supreme Court recently has declined to abandon this general rule of preclusion both in cases of attempted "offensive" use of collateral estoppel, Norfolk & Western Ry. Co. v. Bailey, 221 Va. 638, 272 S.E. 2d 217 (1980), as well as in cases of attempted "defensive" use of collateral estoppel. Greene v. Warrenton Production Credit Assoc., 223 Va. 462, 291 S.E.2d 209 (1982). For a full discussion of the applicable Virginia law, respondent directs the Court to the Brief For Respondent at 14-17, and to the Brief Of Amicus Curiae University of Virginia Post-Conviction Assistance Project.

Unable to point to any case from the Virginia Supreme Court casting doubt on the continuing vitality of this general rule of preclusion, petitioners elevated the denial of a writ of error by the Virginia Supreme Court in Souders v. Gabrielson, et al., Record No. 741124 (Va.Sup.Ct. April 16, 1975), from a footnote in their opening brief (Brief For Petitioners at 20 n. 10) to "precedent" in the reply brief for the proposition that "Virginia law precludes a civil suit based on §1983 after it is demonstrated that the plaintiff had previously pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief To Brief For Respondent at 7)(hereinafter Reply Brief). Noting that Souders involved a §1983 claim unrelated to the exclusion of evidence on fourth amendment grounds, whereas the Prosise court expressly limited its holding to issues related to the admissibility of evidence on fourth amendment grounds, see Prosise v. Haring, 667 F.2d 1133, 1138 (4th Cir. 1981), respondent concluded that Souders is inapposite and concentrated his efforts to determining the precedential effect of the denial of

a writ of error by the Virginia Supreme Court.[1/] However, several members of the Court expressed an interest during oral argument in the precise holding of the Souders court. As a result, respondent has obtained and submits for the Court's consideration additional portions of the record of that case (see Appendix at 1a-15a).

As the attached records reveal, contrary to what petitioners have asserted, the Souders court did not preclude that action once it was "demonstrated that the plaintiff had previously pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief at 7). Instead, the court carefully considered numerous depositions and affidavits, and heard oral testimony and argument, before affirmatively concluding that the §1983 action was precluded by Mr. Souders' earlier guilty pleas to the offenses giving rise to his §1983 claims. This was made necessary, the court stated, "because, on the basis of the plea of res judicata and estoppel filed by the Defendant [sic] it was not, at once, obvious whether all of the issues which are presented in the [§1983] pleadings were, indeed, decided

---

1/ As counsel for respondent pointed out in oral argument, the Virginia Supreme Court has repeatedly stated that the denial of a writ of error by that court has no precedential effect upon the same issues in another case. See e.g., Town of South Hill v. Allen, 177 Va. 154, 12 S.E.2d 770 (1941) ("Whatever reasons impelled the court, as then constituted, to refuse the appeal, this case is not a controlling authority under the doctrine of stare decisis") (id., 12 S.E.2d at 775); Brunswick County v. Peebles & Purdy Co., 138 Va. 348, 122 S.E. 424 (1924) ("The effect of the refusal of the writ in the former case, however brought about, was to affirm the decision of the court below in that particular case, ... but the refusal of that writ did not decide the question involved in any other case") (id., 122 S.E. at 430). Cf. American Railway Express Co. v. Levee, 263 U.S. 19 (1923); Western Union Telegraph Co. v. Crovo, 220 U.S. 364 (1911) (the fact that the state Supreme Court denied a discretionary writ of error, stating that a review of the record below revealed no reversible error, "did not take from the refusal its ostensible character of declining jurisdiction" so that a petition for writ of certiorari seeking review by this Court will lie to the state trial court as "the highest Court of the State in which a decision could be had"). American Railway, supra, 263 U.S. at 20-1. Therefore, even were the Souders case on point, which it is not (see discussion infra at 4), it would have no controlling effect upon the issues raised in this case.

[by the guilty plea] in those lower Courts" (Appendix at 5a) (emphasis added).

In deciding that Mr. Souders' §1983 claims "were, indeed, decided" by his guilty pleas, the Court noted that Mr. Souders had not alleged that "any force was used on him, except that force used to subdue his resistance to arrest" (Appendix at 6a). Because Mr. Souders was privileged under Virginia law to resist an unlawful arrest, the court reasoned, his resistance was unlawful only if the arrest itself was lawful (Appendix at 7a). Consequently, the court concluded, Mr. Souders' plea of guilty to resisting arrest by assaulting the arresting officers necessarily decided the question whether the resistance was unlawful and the arrest was lawful (Appendix at 9a). Moreover, the court noted, Mr. Souders' guilty plea to drunk in public was an admission that his arrest for that offense was lawful. (Id.) For those reasons, and not simply because he had pleaded guilty, the court held that Mr. Souders was precluded by his guilty pleas from claiming in a subsequent §1983 action that his actions were lawful and the actions of his arresting officers in arresting and subduing him were unlawful. (Id.) Apparently recognizing the continuing vitality in Virginia of the traditional rule concerning the mutuality of judgments, the court then determined that Mr. Souders' §1983 claims fell within the exception to the mutuality rule first enunciated in Eagle, Star & British Dominions Insurance Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927), concluding that because Mr. Souders was injured while unlawfully resisting a lawful arrest, and not during an unlawful arrest or after he was reduced to police custody, he should not benefit from the injuries he caused by wrongfully resisting arrest (Appendix at 10a).

To find support for their position in Souders, petitioners

have misstated the holding of the court below in this case[2/] in order to construct an argument that it conflicts with a holding in Souders which that court did not make.[3/] Simply put, the Souders court did not hold as petitioners have stated that it did. Moreover, even if it had, it did not involve the precise issue decided by the court below in this case. Finally, even if it had involved the same issue, the denial of a writ of error by the Virginia Supreme Court has no stare decisis effect upon that issue in any other case. For these reasons, petitioners can find no support for their position in Souders.

On the contrary, Souders fully supports respondent's contention that collateral estoppel in Virginia extends only to issues: (1) which were actually litigated in the earlier action; (2) which were necessary to the judgment in that case; and (3) which satisfy the rule of mutuality or fall within the recognized exception to that rule (Brief for Respondent at 14-17). For that reason, because Mr. Prosise's fourth amendment claim was not litigated by his guilty plea, because resolution of that issue was not necessary to the guilty verdict, and because there is no mutuality of judgment or exception to that rule in his case, he is not precluded by conventional Virginia preclusion law, or by the decision in Souders, from litigating his claims in this action.

2/ Petitioners incorrectly stated that the Prosise court "held that, in Virginia, a flat rule of nonpreclusion always permits persons to sue police officers pursuant to 42 U.S.C. §1983, notwithstanding a claimant's guilty plea" (Reply Brief at 2)(emphasis added), despite the clear language of the court which expressly limited its holding to unlitigated issues related to the admissibility of evidence on fourth amendment grounds (Prosise, supra, at 1138), while assuming that a §1983 claimant normally would be precluded from relitigating elements of an offense to which he earlier had pleaded guilty (Id. at 1140).

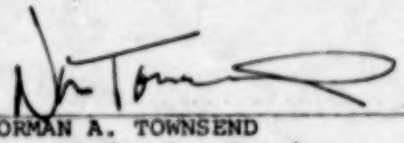
3/ As discussed above, infra at 2-3, petitioners argue that because of the "Souders precedent" (Reply Brief at 4,5,6), Virginia law now precludes all §1983 actions upon proof that the claimant earlier "pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief at 7), despite the fact that the Souders court ruled the claims precluded only after taking evidence and testimony on the question "whether all of the issues which are presented in the [§1983] pleadings were, indeed, decided in those lower Courts" (Appendix at 5a).

CONCLUSION

Contrary to petitioners' argument that the denial of a writ of error in Souders v. Gabrielson somehow changes the law of preclusion in Virginia, that law is well settled in a manner adverse to petitioners' position. Moreover, Souders is in conformity with, rather than contrary to, the settled law in Virginia. For that reason, the decision of the court below in this case is correct and should be affirmed.

Respectfully submitted,

JOHN FRANKLIN PROSISE
By Counsel



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Commonwealth of Virginia

In the CIRCUIT Court of the COUNTY OF ARLINGTON

GUTHRIE E. SOUDERS, Plaintiff

vs. { At Law No. 15840

EDWARD GABRIELSON, DANIEL HARTLE, STEWART PELL and HARRY PARR, Defendants

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I JOSEPH C. GWALTNEY, Clerk of the above mentioned Court, certify that the papers listed above and filed herein, are the original papers in the above styled case.

Teste: _____ Clerk

Commonwealth of Virginia

In the CIRCUIT Court of the COUNTY OF ARLINGTON

GUTHRIE E. SOUDERS, Plaintiff

vs. At Law No. 15840

EDWARD GABRIELSON, DANIEL HARTLE
STEWART PELL and HARRY PARR, Defendants

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A COPY.

TESTE: DAVID A. BELL, Clerk

By _____ Deputy Clerk

I JOSEPH C. GWALTNEY, Clerk of the above mentioned Court, certify that the papers listed above and filed herein, are the original papers in the above-styled case.

Teste: _____ Clerk

V I R G I N I A

ARLINGTON CIRCUIT COURT

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GUTHRIE E. SOUDERS,

Plaintiff

vs.

EDWARD GABRIELSON,

and

DANIEL HARTLE,

and

STEWART PELL,

and

HARRY PARR,

Defendants

AT LAW NO. 15840

- - - - - - - - - - - - - -X

Arlington, Virginia
Monday, June 10, 1974

The above-entitled cause came on to be heard before the Honorable Charles S. Russell, Judge of the Circuit Court of Arlington County, in the courthouse, Arlington, Virginia, beginning at 12:17 o'clock, p.m.

AUDREY J. RUDIGER
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591-3648

APPEARANCES:

For the Plaintiff:

RAYMOND D. CLARK, ESQUIRE

For the Defendants:

SIMMONDS, COLEBURN, TOWNER & CARMEN
BY: GEORGE C. TOWNER, JR., ESQUIRE

CHARLES G. FLINN, ESQUIRE

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EXTRACT OF PROCEEDINGS

THE COURT: Gentlemen, it has been necessary to go through this exercise, I am afraid, in order to determine whether or not the several guilty pleas and findings of guilty made by the County Court and, incidentally, the Juvenile and Domestic Relations Court, were such as to preclude the plaintiff in this case from relitigating the issues so determined in those Courts.

This has been made necessary because, on the basis of the plea of res judicata and estoppel filed by the Defendant it was not, at once, obvious whether all of the issues which are presented in the pleadings were, indeed, decided in those lower Courts.

And, even after deciding it, it is another question, and purely a question of law, as to whether the plaintiff in this case should be precluded simply on those issues and allowed to go to trial on the remaining issues, or whether he is totally barred from maintaining this action against

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these defendants in this case.

Obviously, if the police have every right in the world to arrest a citizen, and they do make a lawful arrest of him, they can not, then, after having handcuffed him, beat him over the head with a night stick, or shoot him, or whatnot, use force unnecessary to the arrest.

If they do that, they're just as liable to civil suit as anyone else.

I mention that, not because that was what was alleged to have occurred here, but that I had to hear evidence to decide that that is not what is alleged to have occurred.

It does not appear from the pleadings in this case or from the plaintiff's own testimony in this case, that he contends that any force was used on him, except that force used to subdue his resistance to arrest.

He does not say that after he was arrested, after he was handcuffed, after

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he was in control, that he was, then, assaulted by the Police.

He says, in his pleadings in this case and in his testimony here today, that he resisted their efforts to arrest him, and, that in his resistance, a struggle ensued, in which he was injured.

It is a rather unusual facet of the law that police officers are, indeed, permitted to use force such as is necessary to reduce a person to control when they go to arrest him.

The test is, is the arrest a lawful one.

If they attempt to arrest a citizen for a cause which is not probable cause, their arrest is an unlawful one, and the citizen has the right to resist them.

He does not have to retreat to the nearest wall, but he can put up such a resistance as one might against any agressor because, [he believes] the officer, then, is in no better position than any other private

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individual, to assault someone else, and the usual rule of self-defense applies.

But, if the arrest is a lawful one, if they have the right to arrest the citizen, then, he correspondingly has no right, whatever, to resist them.

Indeed, it's his duty to submit. If he resists them, then, his resistance is, itself, unlawful and, as a matter of fact, is a separate offense. He has violated the law, simply by resisting their effort to accomplish a lawful arrest of him.

If he is injured in the course of putting up such a resistance, he can not recover for it unless they used excessive force.

Now, the evidence here shows that the plaintiff does not even contend that they used excessive force.

He does not say that the force was more than that necessary to overcome his resistance.

The force was exactly what was

necessary in order to overcome his resistance.

They struck no blows in response to his blow, first struck at them. They produced no weapons, although they had them.

Instead, they tried to hold him and to wrestle his arms into a position where they could handcuff him, and, in the course of wrestling his arms into that position, they apparently broke his shoulder, which is regrettable.

But, they did not step outside of their authority in doing it. In my view, the arrest, which they sought to make, was a lawful one.

His resistance to it was unlawful, and the Court is precluded from relitigating those questions by virtue of his pleas of guilty in the County Court and the findings of the County Court.

Now, in these circumstances, the question still arises, should he be permitted to go to the jury in this case upon the issue of excessive force.

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Not withstanding the way I view this evidence, is the jury going to take another view if they wish.

Should we start by telling the jury that it is conceded here that they had the right to arrest him, and that he had no right to resist?

But, he did resist, and in the course of his resistance, they injured him. It is for the jury to determine whether they used more force than necessary.

Based upon The Eagle Insurance Company vs. Heller Case 149 Virginia 82, it appears to me the answer to that is no, because, in order to permit him to litigate that, would be to seek damages for, what in effect, was his own wrong.

His finding of guilty, particularly based upon his plea of guilty, precludes him from making, what amounts to, a collateral attack on that plea of guilty and to seek to recover damages from the consequences of that wrong, which he was found to have committed.

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And, to my mind, it would make a mockery of the Judicial system, if he were permitted, now, to recover some damages from these police officers whom he stands convicted of having assaulted, under the circumstances in which he has, also, been convicted of the offense for which they went to arrest him.

Again, I conclude that his arrest was a lawful one. In other words, I do not see under these pleadings, how he can go to the jury on any issue arising out of this case without making a collateral attack upon those convictions in the lower Court.

One can try to spin these lines extremely fine, but I think, in order to allow him to go to the jury in any guise in this case would spin them so fine as to make a mockery of justice.

And, so, although the question is admittedly a difficult one, and a close one, I think the plea of res judicata and estoppel must be sustained, and that the effect of sustaining them, must be to bar

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him entirely in this case, and not just to preclude him on these particular issues.

An order will be entered accordingly, and the exceptions of the plaintiff will be noted.

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CERTIFICATE OF REPORTER

I, Latisha S. Lloyd, do hereby certify that I took the stenographic notes of the foregoing proceedings and reduced the same to typewriting; that the foregoing is a true record of the aforesaid proceedings; that I am neither related to, nor employed by any attorney or counsel employed by the parties hereto; nor financially interested in the action.

Latisha S. Lloyd (Lou Wright)
Court Reporter

A COPY,
TESTE: DAVID A. BELL, Clerk
By Barbara Wilson
Deputy Clerk

AUDREY J. RUDIGER
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591-3648

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

GUTHRIE E. SOUDERS,	:	
Plaintiff,	:	At Law No. 15840
vs.	:	
		ORDER
EDWARD GABRIELSON, et al,	:	
Defendants.	:	

This cause came on to be heard on the 10th day of June, 1974, on the Plea of Estoppel and Res Adjudicata filed by the defendants, Edward Gabrielson, Daniel Hartle, Stewart Pell and Harry Parr; and

The Court having considered the legal authorities presented by counsel, having taken testimony with relation to said Plea, having heard the argument of counsel and being of the opinion that said Plea should be sustained,

It is accordingly ORDERED and ADJUDGED that the Plea of Estoppel and Res Adjudicata filed by the defendants, Edward Gabrielson, Daniel Hartle, Stewart Pell, and Harry Parr, be and the same hereby is sustained.

It is further ORDERED that this action be and the same hereby is dismissed with prejudice, to which ruling of the Court the plaintiff, by counsel, duly excepted.

THIS ORDER IS FINAL.

ENTERED: July 18th, 1974

Clark L. Randt
Judge

SEEN:

SIMMONDS, COLEBURN, TOWNER & CARMAN

By George C. Towner, Jr.
George C. Towner, Jr.
Counsel for Defendants

Charles G. Flinn
Charles G. Flinn
Counsel for Defendants

SEEN AND OBJECTED TO:

Raymond D. Clark
Raymond D. Clark
Counsel for Plaintiff

A COPY,

TESTE: DAVID A. PELZ, Clerk

By Mary A. Taylor
Deputy Clerk

No. 81-2169

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RECEIVED
MAY 19 1983
Office of the Clerk
SUPREME COURT, U.S.

GILBERT A. HARING, et al., Petitioners;

v.

JOHN FRANKLIN PROSISE, Respondent.

OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Preliminary Statement

The following is the response of the petitioners to the respondent's Motion For Leave to File Supplemental Brief After Argument. The motion was received on Monday, May 16, 1983, and the petitioners have attempted to provide a prompt response; printed copies will be provided as quickly as possible. This response opposes the motion, but also, because the case is now under consideration and because of the argument in the motion, addresses briefly the major points in the proffered Supplemental Brief.

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No. 81-2169

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GILBERT A. HARING, et al., Petitioners;

v.

JOHN FRANKLIN PROSISE, Respondent.

OPPOSITION TO RESPONDENT'S MOTION FOR
LEAVE TO FILE SUPPLEMENTAL BRIEF
AFTER ARGUMENT

The respondent has moved this Court under Rule 35.6 for permission to file a Supplemental Brief. The petitioner opposes the motion on the following grounds:

1. The essence of the respondent's motion is that he did not realize the significance of the case of Souders v. Gabrielson, Record No. 741124 (Va. Sup. Ct. April 16, 1975), even though it was discussed in the petitioners' "Reply to Opposition to Petition for Writ of Certiorari," "Petitioners' Brief," and petitioners' "Reply Brief to the Brief for Respondent." In that case, the Arlington County Circuit Court, by Judge Charles Russell, held that the plaintiff was collaterally estopped from suing the police officers for damages claiming they used excessive force during their arrest of the plaintiff. The defendants pleaded that "since this action arises from the arrest of the plaintiff on the charge of being drunk in public and the plaintiff's assault upon Officer Gabrielson and since the plaintiff has heretofore admitted being guilty to both of the charges, the plaintiff is estopped in this action from pursuing a claim against Officer Gabrielson and the other defendants arising from the plaintiff's own unlawful conduct." Appendix to "Reply to Opposition to Petition for Writ of Certiorari," at page 9a. The order of the Circuit Court sustained this plea. Id., at 2a-3a. The Virginia Supreme Court denied the plaintiff's Petition for a Writ of Error on April 16, 1975, and expressly stated in its order:

> "[The Petition for Writ of Error] having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court." Id., at page 1a.

The fact that respondent only now appreciate the effect of the Souders case is not a sufficient reason to permit argument by the respondent that could and should have been made earlier.

2. The respondent argues that petitioners have misapplied the Souders case. To support this claim the respondent does not rely upon the order of the trial court, but rather he relies upon the comments from the bench of the trial judge. Contrary to the respondent's protestations in paragraph 6 of his motion, the "holding" of the trial judge in Souders was to sustain the plea of estoppel filed by the defendants. It is this order that the Virginia Supreme Court found to be correct on its merits.

3. Even if this Court now examined the trial court's comments, it would find, as petitioners have consistently argued, that Souders is the Virginia case closest to the issues presented here. In his strenuous effort to distinguish Souders, respondent has in fact shown that in Virginia a trial court can and should decide what issues are or are not precluded by a guilty plea in cases where the admittedly guilty person later sues the arresting officers for civil torts allegedly committed during the arrest. None of the Virginia cases the respondent relies on involve a criminal defendant who later sued the arresting officers. Although the Virginia Supreme Court has, on some occasions, continued to require mutuality, the court, in at least two recent cases, has said it would, in an appropriate case, depart from the rule. See Bates v. Devers, 214 Va. 667, Fn. 7, 202 S.E.2d 917 (1974); Luke Construction Co. v. Simpkins, 223 Va. 387, 291 S.E.2d 264 (1982) (per curiam). The trial judge departed from the rule in Souders and his departure was upheld by the Virginia Supreme Court. Just as the trial judge in Souders examined the factual basis of the criminal conviction to determine what issues were "decided" by the plea, the federal district court judge in the case at bar could examine the factual basis of the respondent's guilty plea to determine if the search at issue in this 1983 action was necessarily decided by the plea. This approach is far preferable to a costly trial on the merits.

4. In his motion, respondent has changed his position on estoppel. Earlier, respondent contended that collateral estoppel could not apply to the case at bar because the validity of the search was never raised in a motion to suppress and, thus, the issue was not "actually litigated" -- an element of collateral estoppel which respondent claims is essential. Now respondent apparently argues at paragraph 6 of his motion that collateral estoppel applies to issues "actually decided," although they might not have been "litigated." Since it is inescapable that Souders involved guilty pleas, respondent must now be admitting that a plea of guilty does necessarily decide certain issues even though the issues were not specifically "litigated."

5. Finally, respondent implies throughout his motion (and in the accompanying Supplemental Brief) that the denial of a petition for a writ of error has no precedential value whatever in Virginia. This is incorrect. In a 1978 booklet entitled "Appellate Advocacy in the Supreme Court of Virginia" co-authored by the Honorable Justice George Cochran of the Virginia Supreme Court and Stuart B. Campbell, the following is said at page 5:

> "If the court finds no reversible error, it shall so state and reject the petition on that ground (§ 8.01-675) [formerly Va. Code § 8-476].... Unlike denial of certiorari by the Supreme Court of the United States, refusal of an appeal by the Supreme Court of Virginia, unless explicitly based on jurisdictional grounds or violation of the Rules of Court, has precedential effect for the order rejecting the petition states that there is no reversible error in the decision of the lower court."

In Stillwell v. Commonwealth, 219 Va. 214, 247 S.E.2d 360 (1978), the court relied upon the earlier denial of a petition for a writ of error. In footnote 4, the court compared the weight to be given its denial of a petition for a writ of error to the Supreme Court's dismissal of a petition for appeal for want of a substantial federal question. Both are treated as decisions on the merits. See also Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974). In his accompanying Supplemental Brief, respondent mistakenly relies upon the Town of South Hill v. Allen, 177 Va. 154, 12 S.E.2d 770 (1941) and Brunswick County v. Peebles & Purdy Co., 138 Va. 348, 122 S.E. 424 (1924), for the proposition that the denial of a petition for writ of error has "no precedential effect." In the Allen case, the court noted that the issue under consideration had been one of seventeen errors assigned in an earlier case where the petition for a writ of error was denied. The court noted that certain evidence was available in the earlier case that might have supported the denial of the writ. Because of

this, the earlier case was "not controlling" under stare decisis. In the Peebles case, the court noted that the earlier refusal of a writ of error in a case involving a similar issue "did not decide the question involved in any other case." The court stated this in dicta after it found that "it was error to refuse the writ in that case" and that the attorney who presented the earlier petition admitted that he was at fault for not more explicitly setting out the question involved in the earlier case. These two cases do not mean that as a general proposition a denial of a petition for appeal has no precedential value; rather the cases only show that just as in any case law situation, a prior case may or may not be persuasive under stare decisis based upon the circumstances of the earlier decision.

CONCLUSION

In short, the argument sought to be made in the motion and in the Supplemental Brief is not substantially new. Indeed, many points are inconsistent with the positions respondent argued earlier. For example, in his conclusion to the proffered Supplemental Brief, respondent argues that Souders is actually in conformity to the settled law in Virginia. In his brief on the merits at page 14, respondent states flatly: "Virginia Law Gives No Preclusive Effect to Criminal Convictions in Subsequent Civil Actions." In denying the petition for appeal in Souders the Virginia Supreme Court recognized that estoppel effect will be given to a criminal conviction where the conviction is based on a guilty plea. Souders is the closest Virginia case on point and it is entitled to precedential weight.

The flat rule of non-preclusion which the Fourth Circuit adopted conflicts with the Souders decision. The trial judge's action in examining the factual basis for the plea in Souders, which was approved by the Virginia Supreme Court, is directly at odds with the Fourth Circuit's position that in the run of 1983 cases it isn't worth the effort to try and decide what issues provided "adequate incentive to litigate" and hence were decided by the plea. A decision by this Court that a person who is convicted by a guilty plea cannot claim that the search which produced the essential evidence of the crime was unconstitutional is compatible with Virginia law. Certainly a flexible rule which allows the trial court to decide what issues should be precluded and not the Fourth Circuit's flat rule of non-preclusion is conformable to the principles of Virginia law.

The motion of the respondent has no merit and should be denied.

Respectfully submitted,

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Counsel for Petitioners

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Counsel of Record and
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposition to Respondent's Motion For Leave to File Supplemental Brief After Argument was mailed, postage prepaid, to Norman A. Townsend, Esquire, P.O. Box 146, Alexandria, Virginia 22313, on this 19th day of May, 1983.

Charles G. Flinn

Charles G. Flinn

No. 81-2169-CFX	TITLE	Gilbert A. HARING, Lieutenant, Arlington County Police Department, et al., Petitioners v. John Franklin Prosise

DOCKETED	COURT
May 24, 1982	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: David R. Lasso
	Counsel for Respondent:
May 24, 1982	Petition for writ of certiorari filed. (Record filed).
June 25, 1982	Brief for the respondent in opposition filed.
June 30, 1982	DISTRIBUTED. SL5P2.
Aug. 10, 1982	Reply brief for the petitioners filed. (D).
Oct. 4, 1982	REDISTRIBUTED. 10-8.
Oct. 12, 1982	Petition GRANTED.

Nov. 5, 1982	Motion of respondent for leave to proceed further herein in forma pauperis filed.
Nov. 8, 1982	DISTRIBUTED. 11-12. (Above motion).
Nov. 15, 1982	The motion of respondent for leave to proceed further herein in forma pauperis is GRANTED.
Nov. 19, 1982	Brief, amici curiae, of Americans for Effective Law Enforcement, Inc., et al. filed.
Nov. 26, 1982	Joint appendix filed.
Nov. 26, 1982	Brief for the petitioners filed.
Dec. 8, 1982	Order extending time to file the respondent's brief on the merits until Jan. 29, 1983.
Jan. 24, 1983	Brief, amicus curiae, for the American Civil Liberties Union filed.
Jan. 29, 1983	Brief for the respondent filed.
Feb. 1, 1983	Brief, amicus curiae, of The University of Virginia School of Law Post-Conviction Assistance Project filed.
Mar. 10, 1983	CIRCULATED.
Apr. 1, 1983	Reply brief for the petitioners filed. (D).
Apr. 20, 1983	ARGUED.
May 13, 1983	Motion of respondent for leave to file a supplemental brief after argument filed.
May 23, 1983	DISTRIBUTED. 5-26. (Above motion).